**Yearbook of New Zealand Jurisprudence**

# Tūhonohono: Custom and State

**Volume 13 & 14 (combined)**
**2010 & 2011**

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# Yearbook of New Zealand Jurisprudence

**Volumes 13 & 14 (combined)** **2010 & 2011**

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## Foreword

# Tūhonohono: Custom and State – A Symposium[1]

The Hon Sir Anand Satyanand
Governor-General of New Zealand

Elders of Tainui, Your Honours (Judges), Officials and Scholars of the University, Distinguished Guests, Ladies and Gentlemen, I greet you in the languages of the realm of New Zealand – English, Māori, Cook Island Māori, Niuean, Tokelauan and Sign Language.

I stand before you today not only in the capacity of Governor-General, but also as a former member of the Te Mātāhauariki Research Institute Advisory Panel from 1997 to 2006. As such, I have amongst you many personal and professional friends.

There is a connection between Te Mātāhauariki and Government House that bears mention. At the launch of Dr Alex Frame's book *Grey and Iwikau: a journey into custom* at Government House in 2002 the Institute gifted an illustration from the book to Government House and it still hangs in Government House and is a reminder of the connection.

Tūhonohono, a linking together or bonding, is the central principle of this symposium. It describes the dual mandate of the symposium, which is first to present the Institute's work, *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law*, and secondly to discuss the place of Māori customary law in New Zealand.

During my time with Te Mātāhauariki the *Te Mātāpunenga* project was devised and nurtured over time. It is a thrill to see it finished.

It reflects the Institute's objective to join the customary visions of Māori and Pākehā in a cohesive New Zealand jurisprudence.

It also reflects the coming together of Pacific scholars to advance the understanding of custom law and its contribution to state legal systems.

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1 Opening Address at the Symposium, Tainui Endowed College, Waikato, 22 June 2007, slightly abridged. Original text may be downloaded from <http://gg.govt.nz/node/630>.

The symposium is based on three themes, finding, understanding and applying custom. Each theme flows logically to the next, as one cannot apply or understand custom without first finding its location. However, as these three themes will be the subject of much discussion over the following days I would like to comment briefly on what I consider to be the importance of *tikanga Māori* to New Zealand in 2007.

Where we have come from, as a nation, is important in determining the relevance of tikanga Māori today. As recipients of an English judicial system, we inherited English common law and legislation yet, even at an early stage, tikanga Māori was recognised. I quote Sir John Salmond in 1924 in reference to the Native Rights Act 1865 from *Grey and Iwikau: A Journey into Custom:* "aboriginal Maoris should to a large extent continue to live by their own tribal customs, and to this extent those customs were given by statute, and still remain, the authority of law".[2]

As a distinct New Zealand customary law developed the survival of tikanga Māori has often been attributed to its dynamic nature and its ability to change. The disappearance of some practices – such as deliberate cursing – and the arrival of others – such as burial practices – is an example of the adaptability of tikanga Māori.

In conjunction with this, a continual recognition and application of tikanga Māori by Judges in our courts has seen it survive and, if anything, gain importance as a part of New Zealand common law. Today it is of practical relevance in sentencing, in family protection claims or where a statute expressly requires consideration of it, for example the Resource Management Act. It is also applied in situations where customary law survives unaffected by any other subsequent legislation.

This symposium will not only explore the origins of tikanga Māori but perhaps, more importantly, consider the future role it may play in our legal system. With the attendance of our Pacific neighbours, where native customary law is in many cases more prevalent, much can be learned both from their experiences and our own over the next two days.

I would like to close by resonating a Māori proverb which I believe is reflective of the symposium's purpose:

> *Waiho i tetoipoto, kaua i tetoiroa*
> "Let us keep close together, not far apart."

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2 Sir John Salmond *Jurisprudence or the Theory of Law* (7th ed, Stevens and Haynes, London, 1924) at 210, quoted in Alex Frame *Grey and Iwikau: A Journey into Custom* (Victoria University Press, Wellington, 2002) at 64.

I wish Tainui Endowed College and Te Mātāhauariki Research Institute all the best for the Tūhonohono: the State and Custom Symposium 2007.

I began speaking in all the New Zealand realm languages. May I close by speaking in Māori issuing greetings and wishing you good health and fortitude in your endeavours.

Nō reira, tēnā koutou, tēnā koutou, kia ora, kia kaha, tēnā koutou katoa.

**Tūhonohono Symposium**

**Custom & State**

**22 – 24 June 2007**

**HOPUHOPU**

TAINUI

Endowed College
451 Old Taupiri Road
NGARUAWAHIA 3742

TE MATAHAUARIKI

Research Institute
University of Waikato
HAMILTON 3240

# Preface

# Tūhonohono: Custom and the State – Celebrating the Launch of *Te Mātāpunenga*[1]

The Hon Justice Sir David Baragwanath

The week of 22 June 2007 was a time for treble celebration. That day and over the following weekend we recognised the brilliant success to date of Te Mātāhauariki and looked to what we were sure would be its exciting future; the following Friday there was a further event to mark the 20th anniversary of the *Māori Council* case; that evening *Te Mātāpunenga* ran down the skids into the water to begin its voyage.

The title of the symposium of which this issue of the *Yearbook of New Zealand Jurisprudence* at last provides a permanent record – Custom (which alludes to Māori custom) and the State – took me to the sometime New Zealander Karl Popper who, with his intellectual genius tempered by exposure as a Jew to the injustice of Hitler, analysed the raison d'être of the state. In his celebrated *Open Society and its Enemies*[2] he argued that it is simply to ensure justice: that the strong do not bully the weak. That should be the function of the laws and institutions of the state.

But as all of us know so well, it is never enough for minorities – even those equipped with a solemn Treaty promise – to sit back and expect their rights to be protected and their culture promoted. They must take positive steps in their own and in the wider public interest. That truth is what the *Māori Council* case was about. It is also, in my view, a major element both of the original justification for Te Mātāhauariki and of its stunning vindication today in *Te Mātāpunenga*.

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1 The edited text of a speech by Justice Baragwanath at the opening of the Tūhonohono symposium, marking the release of the pre-publication draft of *Te Mātapunenga* on CD to all symposium participants. The publication of the work in final, printed form is expected in 2012–13.

2 *The Open Society and its Enemies: The Spell of Plato* (Vol 1, Routledge, UK, 1999) at 111.

Schiller wrote "die Sprache ist der Spiegel einer Nation": language is the mirror of a people. In 1985, appearing before the Waitangi Tribunal as it heard the Māori language claim, Sir James Henare echoed that sentiment in what are now two of New Zealand's official languages:[3]

> The language is the core of our Māori culture and mana. Ko te reo te mauri o te mana Māori. (The language is the life force of the mana Māori.) If the language dies, as some predict, what do we have left to us? Then, I ask our own people who are we?

Conquest by the English language of aviation, business and now the internet has been due to its accessibility in written form. The burgeoning of English has created a cultural neocolonialism more potent and long-lived than the British Empire which did so much to develop it, including the invasion of the Waikato.

It is therefore wholly appropriate that, as a counter-attack to the cultural and intellectual equivalent of the Land Wars, this mighty *Compendium of References to the Concepts and Institutions of Māori Customary Law* should be launched in the heart of the Kīngitanga, on Raupatu land at what was a military base and is now The Tainui Endowed College. Wouldn't Sir Robert be pleased!

While diminution of a language diminishes both the people and their culture, the opposite is equally the case. Professor Frame's lucid expression of the purpose first of Te Mātāhauariki and now of *Te Mātāpunenga* recounts the establishment of the Institute:[4]

> to explore the possibilities for the evolution of laws and institutions in New Zealand to reflect the best of the values and concepts of both founding peoples of the state, Māori and European.

The name Tūhonohono, or bonding together, expresses perfectly the vision of a cohesive New Zealand jurisprudence.

Every day in my court we see the evidence of the social and economic consequences of the monoculturalism which is all too evident in this address. But as those of us brought up in English-New Zealand law slowly unwrap our xenophobic jurisprudential mummy-casings we are coming to appreciate the truths of which the Compilers write in their inspirational Introduction.

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3 *Report of the Waitangi Tribunal on the Te Reo Māori Claim* (WAI 11, Waitangi Tribunal, Wellington, 1986) s 6.1.21.

4 "A Short History …", this volume.

My initiation was at Te Hāpua two decades ago this week. The elders of Muriwhenua courteously and patiently began to introduce me to the overriding of their culture by the European juggernaut, which had used monocultural laws and institutions to sweep away the fishing rights their ancestors had enjoyed for a millennium. Since then much has changed. So it was my privilege last year, chairing the Rules Committee, to introduce Rule 65A of the High Court Rules implementing the right to speak Māori in court, belatedly acknowledged by the Māori Language Act 1987.

But that is small fry. For the past eight years, under the visionary leadership first of Judge Brown and later of Professor Frame, the Editorial Board consisting of Alex Frame, Richard Benton and Paul Meredith has been working on the big one. Like James Murray's *Oxford Dictionary*, *Te Mātāpunenga* includes the labour of others. But those others are not mere hoarders of information but scholars in their own right, Māori and Pākehā. They include Dr Tui Adams, the late Nena Benton, Tonga Karena, Joeliee Seed-Pihama, and Wayne Rumbles, backed up always by the great administrative support of Sue MacLeod. The quality and quantity of their work on this and other projects is outstanding.

For those of the Advisory Panel it has been an immense privilege and a delight both to meet the intellectual leaders of our society and to see something of the work in progress. One of our number has been of great assistance to the Team – Dame Joan Metge.

Unlike any dictionary, it is not confined to words and a sterile account of their meaning and derivation. Instead the authors have applied the lesson of Bentham, adopted by Professor Hart in his essay "Definition and Theory in Jurisprudence"[5] and by the New Zealander Professor Donald Harris QC in "The Concept of Possession in English Law".[6] Legal concepts cannot be defined, but only described by reference to illustrative cases. One or two judges have overlooked that lesson, by trying to define Māori culture with the help of conventional dictionary definitions.

*Te Mātāpunenga* now comes to our aid by providing for each entry its context, which at last Western jurists are coming to realise is critical to understanding any legal thing. That is the state of the art.

But it does more. Vitally, it makes Māori language and concepts accessible to scholars and the general public alike. Like Te Māori – the Exhibition that transformed Western appreciation of Māori art and craftsmanship – this great treasury of historical materials brings the Māori world alive for others.

5 (1954) 70 LQR 37.

6 Anthony Guest (ed) *Oxford Essays in Jurisprudence* (Clarendon Press, Oxford, 1968) at 69.

The Māori artefacts so prominent in the grand new Musée du quai Branly in Paris, as well as in the British Museum and in other great galleries, are now acknowledged as a major contribution to world culture. In future scholars and general readers alike will be able, internationally, to add the wealth of information and erudition of this volume to their intellectual store. My expectation is that, like Sir George Frazer's *Golden Bough* in 1890 with its introduction to new experiences and ideas, the work will capture the public's imagination. Lacking the capacity to express the sentiment in te Reo, I adopt Keats' way of putting it:[7]

> Then felt I like some watcher of the skies
> When a new planet swims into his ken;
> Or like stout Cortez, when with eagle eyes
> He star'd at the Pacific – and all his men
> Look'd at each other with a wild surmise –
> Silent, upon a peak in Darien.

Even more important, in my view, is the message *Te Mātāpunenga* has for Māori. This is an outstanding addition to the list of great Māori works of scholarship. Some 12,000 miles and 400 years away Pākehā New Zealanders identify with Shakespeare's vision – take his "Sir Thomas More's" account of refugees:[8]

> Grant them removed, and grant that this your noise
> Hath chid down all the majesty of England;
> Imagine that you see the wretched strangers,
> Their babies at their backs and their poor luggage,
> Plodding to th' ports and coasts for transportation…

used to lend emphasis to a recent immigration judgment.

Like the role of great literature for the Western world, *Te Mātāpunenga* shows to Māori what they have done, what they can do, and indeed what they are. Its account of Māori achievement will add to the confidence, self-esteem and vision of the young Māori whose sense of full participation in all that is good in New Zealand society is so crucial to its future and to theirs.

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7 "On First Looking into Chapman's Homer" (October 1816).

8 *Sir Thomas More*, Act II, Scene IV. (The play is ascribed in part to Shakespeare.)

# Editor's Introduction

The casual reader of this Yearbook could well imagine that they had entered Dr Who's *Tardus*. The volume is the issue of the *Yearbook of New Zealand Jurisprudence* for the years 2010-11, and consists of a set of articles stemming from an invitational symposium on Custom and the State which took place in July 2007; all the chapters have, however, been revised by their authors since they were originally presented – some indeed are new works exploring the original themes – and many contain references to works published or websites accessed up to the end of 2011. A word of explanation is therefore in order!

The symposium from which these papers are drawn was held to mark the completion of the Foundation for Research, Science and Technology (FRST)-funded phase of the University of Waikato's programme of research into Laws and Institutions for Aotearoa-New Zealand, conducted under the auspices of the University's Mātāhauariki Institute. This project had attracted 10 years of continuous support under the Public Good Science Fund, which in itself was a unique accomplishment and a tribute to the quality and importance of the research conducted. The symposium highlighted in particular the Institute's work and interest in the intersection (and integration) of customary and state law, and was an opportunity to present the first draft of its major compilation of information about Māori customary law, *Te Mātāpunenga*, to an audience of jurists and other scholars from New Zealand and the South Pacific.

Although early publication of the symposium proceedings proved impossible, authors of key papers were informed that publication was delayed, not abandoned, and the invitation from the publishers of the *Yearbook of New Zealand Jurisprudence* to prepare them for the 2010-11 issue was welcomed and enthusiastically accepted.

The Symposium was structured around three themes, still reflected in the chapters in this Yearbook: *finding Māori custom and the State* (contributions by Alex Frame, Wayne Rumbles, Richard Benton and John Farrar), *understanding custom* (Helen Aikman, Tamasailau Suaalii-Sauni, Claire Slatter and Melody MacKenzie), and *applying custom* (Taihakurei Durie, Robert Joseph, Paul Heath, Grant Young and Caren Fox). The papers and discussions were integrated and commented on by Guy Powles, who has contributed the overview chapter with which this volume concludes.

The Mātāhauariki Institute itself was also a focus of attention at the symposium, reflected in this volume by the prefatory remarks by Sir Anand Satyanand and Sir David Baragwanath, and the chapter on the history of the institute by its former Director, Dr Alex Frame, and his associates. In this

context, it is important also to note that the symposium was jointly hosted by the Waikato Raupatu Land Trust's Tainui Endowed College, and was attended by prominent members of the Waikato confederation of iwi. These aspects of the symposium were referrred to in the opening remarks by the Governor-General, and the oral presentations of many participants. The Fijian scholar Claire Slatter reflected the sentiments of participants generally in the introduction to her presentation:

> I wish to acknowledge the Tainui people, on whose land we stand, our hosts in the Te Matahauariki Institute, the Governor General, Judge Eddie Durie and other members of the judiciary, members of the legal fraternity, academic colleagues, and friends, kia ora, bula vinaka and namaste. I am honoured to be amongst you today, and I thank you for your kind invitation to speak at this important symposium which, among other things, has given us privileged first access to the results of the excellent work of the Te Matapunenga project – the comprehensive compendium of references to the concepts and institutions of Maori customary law – I congratulate Dr Alex Frame [Director of the Institute] and his team on their achievement.

The Symposium concluded with an overview of the themes and ideas to emerge provided by Guy Powles, of Monash University, who generously agreed to provide a similar overview of the papers published in this volume, along with his own contribution, widening the discussion to include Pacific jurisdictions other than those referred to directly by most of the other contributors. There is no need to duplicate Dr Powles' overview here, and I will confine my own remarks to an aspect of just one of the chapters included in the volume. This is the very important presentation by retired Justice Sir Edward Taihakurei Durie on the Law Commission's proposals in 2007 for the statutory recognition of a new kind of Māori business collective to be known as "Waka Umanga". This origin of this proposal was characterised by one prominent Māori Member of Parliament as:[1]

> The intelligentsia sitting with their flat whites, pontificating about how they can help the lumpen proliteriat! That is how the Waka Umanga (Māori Corporations) Bill came about.

Others, however, considered it to be a well-considered proposal designed, in Justice Durie's words, to create an atmosphere in which:

> The promoters of tribal corporations may now be obliged to devise and comply with democratic formation plans with transparent and just processes, all of which may be vetted by the Māori Land Court.

1 Hon Tau Henare NZPD Vol 644 11 Dec 2007 13858–81 at 13858.

The politicians decided otherwise, but it remains an important proposal, perhaps ahead of its time, the discussion of which is certainly an appropriate subject for inclusion in this *Yearbook of New Zealand Jurisprudence*.

## *Format*

The format of this publication generally follows the guidelines established by the New Zealand Law Society. Citations to statutes and court cases have generally been left in the conventional format of the appropriate jurisdiction (United States or New Zealand). Words from Māori, Samoan and Hawaiian have not been italicised in the authors' text. Orthography raises complex questions, as customary practice varies among jurisdictions. The general rule has been that in direct quotations the orthography of the original source is retained, and in personal names the preferred usage of the bearer has been respected. In Māori words, vowel length is generally marked by the macron except for a few words where a "double vowel" is commonly used in English or Māori writing (e.g. "waahi tapu" as an alternative to "wāhi tapu"). In Hawaiian and Samoan the authors have been left to follow their normal orthographic conventions, with direct quotes and names treated as for Māori. The various papers in this collection are referred to interchangeably as "chapters", "articles" or "contributions". Another slight departure from the norm is the inclusion of short biographies of each author at the end of the volume, instead of the one-line note about their current position at the beginning of each article.

## *Acknowledgments*

This work is the product of the collective effort of many people over a long period of time. Special thanks are due to my colleagues in Te Mātāhauariki Institute, Robert Joseph (Associate Editor of this volume), Wayne Rumbles and Alex Frame for keeping this project alive in the consciousness of the Faculty of Law, Waikato University, and their direct assistance in ensuring that the final product sees the light of day. The support of the Dean of Law, Professor Bradford Morse, is also greatly appreciated. Guy Powles and Alex Frame have given invaluable assistance in carefully reading and commenting on many of the manuscripts. I am also grateful to Janine Pickering, Administrative Assistant at the Faculty of Law, Brian O'Flaherty (copy editor) and Amanda Colmer (design and production editor) for their indispensible help in ensuring that this work has proceeded smoothly through the various phases of editing to production. Finally, I must express my gratitude to the authors for superb cooperation in enabling us to meet a very tight deadline after many delays in transforming the idea of a publication into a reality.

R.B.

# A Short History of Te Mātāhauariki Research Institute

Dr Alex Frame, Wayne Rumbles and Dr Richard Benton

## I. Background to the Establishment of Te Mātāhauariki

Te Mātāhauariki Institute was established to continue the work of a research programme which had been established under a contract awarded under the Public Good Science Fund (PGSF), to the School of Law at the University of Waikato. This was the first law project to be so funded in New Zealand. The programme, titled "Laws and Institutions for a Bicultural New Zealand", was developed by Professors Paul Havemann and Margaret Bedggood, at the suggestion and under the guidance and encouragement of Professor Michael Selby, then Deputy Vice Chancellor in charge of Research. The design and writing of the programme itself was almost entirely the work of Professor Havemann. The funding granted initially was $450,000 for two years.

The central vision, or rationale, of the programme was described thus in the successful proposal:

> The law and therefore the legal system and legal and political institutions should both shape and mirror the values of a society. The law and legal and political institutions in a truly bicultural society should therefore reflect the values and approaches of both cultures. In Aotearoa/New Zealand the law, legal system and legal and political institutions have, for the most part, reflected only one culture.

It comprised four "objectives":

- Bicultural Methodology and Consultative Processes;
- Bicultural Political – Legal Continuum;
- Māori Law and State Law : A Case Study (on property-related concepts);
- Bilingual Information Transfer.

This programme can be traced back to work on Māori Custom law, undertaken by the Law Commission in the 1990s. The Commission's programme began with the appointment in 1993 of a Māori Advisory Committee chaired by the late Bishop Manuhuia Bennett. The Commission also took up an

unpublished paper by a member of the Advisory Committee, Chief Judge Eddie Durie, on Māori Custom Law. This initiative was soon embraced, with the Commission's blessing, by the University of Waikato, which held two "bicultural conversations" in 1995 under the auspices of the Law School, bringing together a number of people who would later be associated with the research programme and where many of the ideas later incorporated into its content were discussed.

The programme began well, with the recruitment of an Advisory Panel, a concept which endured throughout the history of the Institute. The first meeting of the Panel was chaired by Chief Judge Eddie Durie and members included David Oughton, Denese Henare, Dr Matthew Palmer, Professor Richard Sutton, Professor MM Durie, Sir Robert Mahuta, Professor James Ritchie, Manuka Henare, Dr Joan Metge, Professor Wharehuia Milroy, Professor Michael Selby, Professor Tamati Reedy, and the Law School's Kaumatua, Henry (Binga) Haggie. The project received enthusiastic endorsement.

Unfortunately, for a number of reasons, the Law School was not in a position to maintain the Programme on its own. Even after the appointment of Judge Michael Brown to head the project, it became clear that it would have a better chance of success and survival if it were to be detached from the Law School and established as an independent research institute. In 1997 this was effected, again through the support and expertise of Professor Selby. The new Institute, soon to be named Te Mātāhauariki, was thus established as a stand-alone entity, responsible directly to the Deputy Vice Chancellor of the University, to take over, implement and then renew the original contract. Its mission was to explore the possibilities for the evolution of laws and institutions in New Zealand to reflect the best of the values and concepts of both founding peoples of the state, Māori and European.

Judge Brown's directorship from 1997 to 2004 saw the recruitment of additional members to both the Advisory Panel and the Research Team. As well, the stimulating discussions of theoretical and methodological questions grew naturally into more concrete projects. Collaboration with Te Ariki Tumu Te Heuheu and his Ngāti Tūwharetoa tribe came to provide a practical model for scholarly collaboration. The Te Mātāpunenga research project grew from the realisation that a base of knowledge about Māori customary law was a prerequisite if the Institute were to advance its aim, which now came to be stated as "exploring ways in which our legal system might reflect the best in the concepts and values of both its major founding cultures". The Institute's website, an important instrument for reaching a wider audience, was created by Wayne Rumbles in this period. Satisfaction with the work of the Institute

during Judge Brown's term was such that the Foundation for Research, Science and Technology (FRST) progressively extended the funding until June 2007. The long-term funding of this project was again something without precedent.

When Judge Brown stepped down from the directorship in 2004, Alex Frame and Wayne Rumbles acted in his place until, in June 2005, Dr Frame accepted formal appointment as director until the completion of the FRST contract in June 2007. That funding, which ended with the meeting that provided the stimulus for the book in which this account appears, was used partly to discover the key concepts, philosophies, beliefs, values, customs, ethics and practices that form Māori law and jurisprudence. Among other initiatives, this resulted in a compilation, launched in an advanced draft form at the symposium, called *Te Mātāpunenga – a Compendium of References to the Concepts and Institutions of Māori Customary Law*. It was hoped that the Institute's work might be continued by another agency, focusing on the practical application of concepts from Māori custom law within specific areas of the general legal system, and the development of custom law to meet the particular needs of Māori, especially in the areas of tribal and community governance.

## II. Tūhonohono – Custom and the State

The dual mandate of the symposium, Tūhonohono, held from Friday 22nd to Sunday 24th June 2007 to mark the end of the FRST-funded phase of the *Laws and Institutions* Programme, was firstly to present the Institute's work in the compilation of *Te Mātāpunenga: a Compendium of References to the Concepts and Institutions of Māori Customary Law*, and secondly to provoke discussions relevant to the work ahead.

"Tūhonohono" refers to a bonding, in reference to the Institute's object of joining the customary visions of Māori and other New Zealanders in a cohesive, New Zealand jurisprudence. It also describes the work method for this symposium, of joining with Pacific scholars to advance the understanding of custom law and its contribution to state legal systems.

In accordance with the symposium's first theme, "Finding Custom", *Te Mātāpunenga* was discussed by the Editorial Board (Alex Frame, Richard Benton and Paul Meredith), and the draft text in CD format was launched by Justice David Baragwanath following the opening by His Excellency the Governor-General, Sir Anand Satyanand. The remaining two days focused on possibilities for future work in relation to the understanding and application of customary concepts, in the general law, and in the law particular to Māori, with papers presented on the Saturday and with open discussions on the development of custom on Sunday.

## A. *Tāngata Māori – Tāngata Pasifika*

Those familiar with Māori oratory or the studies of traditional Māori society will appreciate the Māori sentiment of a familial bond with Pacific peoples. Māori stories and genealogies record a period when Māori lived in the islands, and still today farewells are made to the spirits of the recently departed as they begin their return to the Pacific homeland. Accordingly, while Māori have associated themselves with the experiences of indigenous minorities like Australian Aboriginals and native North Americans, as in the recent drafting of an instrument on indigenous peoples' rights, the Pacific connection is based more soundly on the bonds of kinship, common culture and shared oceanic experiences.

Over the last hundred years the bond with the Pacific has been expressed in a range of conferences and cultural events, extending to the replication of traditional ocean voyaging. Early events included the collaboration with Pacific contingents at the 1906 New Zealand International Exhibition at Christchurch, the Rarotongan attendance at the opening of the whare rūnanga at Waitangi in 1934, and later in that year the naming of an east coast ancestral marae as Te Hono ki Rarotonga (The Bond with Rarotonga).

The Waikato tribes of the Kīngitanga have taken a leading role in forging significant personal bonds with leading Pacific families. These are renewed at annual celebrations attended by tribes from throughout the country. Accordingly, in advancing the study of Māori custom law it was fitting in organising the Symposium for Te Mātāhauariki to join with Pacific scholars at the Tainui Endowed College established by the Waikato people, in recognition of their commitment to scholarship and the links they have assiduously maintained with the Pacific. Te Mātāhauariki was particularly grateful to the College, to its then Director, Dr Ngapare Hopa, and Mr Hemi Rau, as Chief Executive of the Waikato Raupatu Trustee Company, for hosting this symposium.

## B. *Ngā Take: Issues*

There are also pragmatic reasons for engaging with the Pacific. The more regular application of custom in the Pacific provides insights for Māori, for whom the use of customary institutions and processes for the resolution of disputes is now rare. But what weight is to be given to comparisons with the Pacific when customary practices vary considerably both between and within Pacific states?

Arguably, while the differences appear large for those intimately involved, the practices stem from values that are relatively uniform throughout the Pacific states, notwithstanding the expanses of ocean between them. Among differences, which have also to be considered, the most obvious, in relation to most Pacific states, is that Māori are a small minority in their country (presently about 15 per cent of the population). Accordingly, issues arising from the constraints of majority opinion on the development of custom law will not have the same importance for Pacific Islanders. The differences should not be exaggerated, however, since Pacific customs are increasingly affected by international norms, and even the opinions of aid donors and international financiers.

A particular area where Māori and Pacific peoples share a common interest is in the incorporation of customary values into state legal systems. While most Pacific peoples enjoy political control in their countries, and while most Pacific constitutions expressly envisage the advancement of Pacific customs and values, judges frequently do not refer to these in the decisions of courts of Pacific states. More frequently, Pacific jurisprudence reflects Western values and processes, implicitly ignoring any need for people to feel that their values are incorporated in the procedures and decisions of their legal institutions. On the other hand, while Māori do not have the same political opportunities to advance their customary systems, some progress has been made in developing a bicultural jurisprudence, and Māori values have been incorporated into general law. By way of comparison, Melody MacKenzie from the University of Hawai'i discussed the incorporation of native Hawaiian values into general Hawaiian law, where again the native people are a minority ("Hawaiian Values in State Legislation").[1]

In addition, Māori and Pacific Islanders face similar problems in relation to the conflict between custom and human rights, as were considered generally in relation to the Pacific by Dr Sailau Suaalii ("Custom and Human Rights") and more particularly in relation to Pacific women and children by Dr Claire Slatter ("Gender and Custom in the South Pacific"). The danger of viewing custom in an uncritical manner caused the organisers to ask Helen Aikman QC, at the time a Law Commissioner in New Zealand, to consider whether custom is, or can be, "conservative" and, if so, whether that is a strength or a weakness. The Hon Justice Paul Heath explored some difficulties in fitting customary principles into the overall legal system ("'One Law for All' – Problems in Applying Maori Custom Law in a Unitary State").

1 In this discussion titles of presentations are those of the papers presented at the Symposium; most of the presenters are represented in this volume, in some cases with substantially revised or new contributions on similar themes but with new titles.

The opportunity to consider the application of customary principles in discrete areas of New Zealand law was considered in various contexts. Dr Grant Young traced the approach of the New Zealand Land Courts towards Māori custom ("The Māori Land Court and Custom"), and Chief Judge Joe Williams discussed practical issues facing Judges in applying custom today. Dr Robert Joseph explored aspects of the interface between Māori custom and State regulatory systems ("The Interface between Māori Custom and State Regulatory Systems – Tikanga Māori and Wāhi Tapu"), and The Hon Taihakurei (Eddie) Durie discussed the development of custom law to serve the particular needs of Māori in relation to the formation and management of tribal authorities ("Custom and the Formation of Tribal Authorities").

Three general issues which Institute researchers found surfacing in many consultations and discussions with a wide variety of groups over a long period, and which the Editorial Board of Te Mātāpunenga found it necessary to discuss in the *Introduction* to that volume (which, it is anticipated, will be prepared for publication in its final form in 2012), were:

(1) The difference between custom (habit/fashion) and customary law (obligation) and how to find a definition that allows us (contrary to Western traditions) to call "spiritually sanctioned" norms "laws".

(2) Putting to rest a certain Western tradition, still sometimes found underlying hostility to custom, of calling other systems of law "primitive".

(3) The so-called issue of "Genuine" versus "Spurious" custom, and the general charge that custom is being made up to suit.

These issues also arose in discussions at the Symposium, informed by the presentations and also by the notes on Māori custom law in New Zealand, distributed to Symposium participants at the outset, and incorporated in Chapter 2 of this volume. The work of the Institute and the proceedings of the Symposium are small but we hope nonetheless significant contributions to the task of building a more inclusive, just and equitable society:

"He rau ringa, e oti ai" (With many hands, the job will be finished).

## Appendix

## A List of Publications and Public Presentations by Members of Te Mātāhauariki Institute, 1997–2007

The publications and public presentations of Institute staff and associates are listed here under five headings: *A* cites and summarises the main articles in newsletters; *B* covers books and chapters in books; *C* numbers articles in scholarly journals; *D* lists occasional papers published in-house by the Institute; and *E* gathers together the addresses, speeches and other public presentations made by Institute members during the life of the Institute.

### A. *Newsletters of Te Mātāhauariki Research Institute*

A useful guide to the pattern of work at the Institute from 2000 onwards is provided by the newsletters periodically produced under the deft hand of Paul Meredith. The newsletters were supplied to all members of the Institute (Team and Advisory Panel) along with a network of interested persons included on the Institute's mailing list. They are also available online at the Institute website, which continues to be maintained on the University of Waikato site: <www.lianz.waikato.ac.nz/>. The dates of the Issues with a list of the main items in each are set out below.

*Issue 1, November 2000*
- Introduction by Judge Brown
- Collaborative cross-cultural research
- Judge Brown's practical guide to restorative justice
- Te Mātāpunenga: Māori legal concepts

*Issue 2, February 2001*
- Te Mātāpunenga work well under way
- Judge Brown calls for "national conversation"
- Cross-cultural training with Institute for Professional Legal Studies
- International human rights and the Treaty of Waitangi (Margaret Bedggood)
- Customary law and the modern legal system
- Te Mātāhauariki researcher wins prestigious award
- Human rights and the Treaty of Waitangi

*Issue 3, July 2001*
- A new publication "Korero Tahi"
- Te Mātāpunenga well received at conference
- Kai-Hau: working on an entry for Te Mātāpunenga
- Paul Heath QC appointed to Advisory Panel
- Two reports on custom law

Africa: coexistence of customary and received law

*Issue 4, January 2002*

Meredith and Frame present paper to History Conference
Turnbull Library interest in Te Mātāpunenga
Rob Joseph returns from trip to North America
Website proving useful tool
Re-historicising Māoritanga
Alex Frame in Fiji lands case

*Issue 5, August 2002*

Grey and Iwikau: A journey into custom: launch at Government House
Saying sorry and meaning it (Dr Richard Benton)
A study of Ifoga (Leilani Tuala-Warren)
The government of themselves – progress on Dr Joseph's Thesis
Plan for completion of Te Mātāpunenga

*Issue 6, January 2003*

"Wiremu Tamihana – Rangatira" – launch of Dame Evelyn Stokes' book
Te Mātāpunenga: defining customary law
Sir Āpirana Ngata on the Treaty of Waitangi
Sample entries for Te Mātāpunenga

*Issue 7, September 2003*

Funding for the next 3 years granted: Judge Brown's announcement
Institute researchers asked to assist Te Puni Kōkiri
Māori customary rights – the hard yards (Dr Alex Frame and Paul Meredith)
Presentations by Institute members on human rights and library resources
Te Mātāpunenga milestone reached: "Proto-Compendium"
"Truth and the Treaty of Waitangi" (Dr Richard Benton)

*Issue 8, September 2004*

Who was "Nayti"?
Legal anthropologist to visit Te Mātāhauariki
A study of "Europeanised Māori" (Paul Meredith)
Te Mātāpunenga: introducing the Titles (Dr Richard Benton)
Ohaaki: a power station on Māori land (Dame Evelyn Stokes)
Dr Frame's submission to Parliament on Foreshore and Seabed Bill

*Issue 9, December 2004*

Institute hosts successful Symposium on Polynesian customary law
Legal pluralism revisited (Dr Anne Griffiths, University of Edinburgh)
Samoan custom (Tui Atua Tupua Tamasese)
Lexicography and law (Dr Richard Benton)
Customary concepts in Māori migration accounts (Dr Frame and Joeliee Seed-Pihama)
Performance and Māori custom (Tui Adams, Alex Frame, Paul Meredith)

*Issue 10, October 2005*

He Poroporoaki – Dame Evelyn Stokes
Thanks to founding Director and welcome for new Director
Some lessons from Hawaii (Dr Richard Benton)
Māori ancestral sayings – a juridical role (Joeliee Seed-Pihama)
Te Mātāpunenga roadmaps (Dr Richard Benton)
Website major point of contact for end-users (Wayne Rumbles)

*Issue 11, October 2006*

Advisory Panel member Anand Satyanand appointed Governor-General
Dr Robert Joseph has PhD conferred at University of Waikato
Justice Baragwanath addresses Law Commission on its 20th birthday
"One plus one equals three", Frame and Meredith address Auckland meeting

*Issue 12, May 2007*

Te Mātāpunenga completed – Xmas 2006
Institute joins with Tainui Endowed College for Tūhonohono
Tūhonohono programme and background paper
Judge Brown gives Inaugural ANZAC Address
Dr Joseph investigates demand for collaboration with Māori on "governance"
Victoria University Press to publish "Waikato Quartet"
Meredith and Frame invited to adapt 1+1=3 for US publication

## B. *Books and book chapters authored by Te Mātāhauariki Research Institute members*

1. Alex Frame, "Sovereignty and Self-determination for Indigenous Peoples in Multi-ethnic States, with particular regard to New Zealand and Fiji", in Brij Lal and T Vakatora (eds), *Fiji and the World*, University of the South Pacific, Suva, 1997.

2. Alex Frame, "Property and the Treaty of Waitangi: A Tragedy of the Commodities?", in Janet McLean (ed), *Property and the Constitution*, Hart Publishing, Oxford, 1999, Chapter 11.

3. Alex Frame, "Beware the Architectural Metaphor", in Colin James (ed), *Building the Constitution*, Institute of Policy Studies, Victoria University of Wellington, 2000, pp 426-433.

4. Paul Meredith, "A Half-caste on the Half-caste in the Cultural Politics of New Zealand", in Hartmut Jacksch (ed), *Māori und Gessellschaft*, Hartmut Jacksch, MANA Verlag, 2000.

5. Alex Frame, commissioned biographical essay on Sir Hepi Te Heuheu in *The Dictionary of New Zealand Biography* Vol. 5, Auckland University Press, Auckland, 2000, pp 514-515.

6. Justice Edward Durie, "The Treaty in the Constitution", in Colin James (ed), *Building the Constitution*, Institute of Policy Studies, Victoria University of Wellington, 2000.

7. Denese Henare, "Can or Should the Treaty be Replaced?", in Colin James (ed), *Building the Constitution*, Institute of Policy Studies, Victoria University of Wellington, 2000.

8. Alex Frame, "Beware the Architectural Metaphor", in Colin James (ed), *Building the Constitution*, Institute of Policy Studies, Victoria University of Wellington, 2000.

9. Dame Joan Metge, *Korero Tahi: Talking Together*, Auckland University Press, Auckland, 2001. The work draws on the rich resource of tikanga korero (Māori rules of discussion) to develop a procedure for managing group discussion. This is contrasted with "talking past each other", which had been the focus of an earlier book.

10. Wayne Rumbles, "Treaty of Waitangi: New Relationship or New Mask", in Greg Ratcliffe and Gerry Turcotte (eds), *Compr(om)ising post/colonialism(s)*, Dangaroo Press, Sydney, 2001.

11. Alex Frame, *Grey and Iwikau: A Journey into Custom*, Victoria University Press, Wellington, 2002 (96 pages). An account of the journey overland of Governor Grey and Iwikau Te Heu Heu in 1849-50, and a study of the nature of customary law and its status in the modern legal system of Aotearoa/New Zealand.

12. Dame Evelyn Stokes, *Wiremu Tamihana: Rangatira*, Huia Press, Wellington, 2002. This book documents the life of Wiremu Tamihana Tarapipipi Te Waharoa, a great rangatira of Ngāti Haua.

13. Alex Frame, "Making Constitutions in the South Pacific: Architects and Excavators", in David Carter and Matthew Palmer (eds), *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson*, Victoria University Press, Wellington, 2002, pp 277-295.

14. Richard A Benton and Nena BE Benton, "RLS in Aotearoa New Zealand, 1989–1999", in Joshua A Fishman (ed), *Can Threatened Languages be Saved? Reversing Language Shift Revisited: A 21st Century Perspective*, Multilingual Matters, Clevedon, Avon, pp 423-450. Reprinted in Paul Lassettre (Compiler), *Language in Hawai'i and the Pacific*, Pearson Custom Publishing, Boston, 2005, pp 355-384.

15. Robert Joseph, "Denial, Acknowledgement and Peace-Building through Reconciliatory Justice: A Tainui Case Study", in W McCaslin (ed), *Justice as Healing: Indigenous Ways. Writings on Community Peacemaking and Restorative Justice from the Native Law Centre*, Living Justice Press, St Paul, Minnesota, 2005.

16. Richard A Benton (ed), *Conversing with the Ancestors: Concepts and Institutions in Polynesian Customary Law*, Te Mātāhauariki Institute, University of Waikato, Hamilton, 2006. (Details in List D, below.)

17. Richard A. Benton, "Mauri or Mirage? The Status of the Māori Language in Aotearoa New Zealand at the Start of the Third Millennium", in Amy BM Tsui and James W Tollefson (eds), *Language Policy, Culture and Identity in Asian Contexts*, Laurence Erlbaum Associates, New York, 2007, pp 163-181.

18. Joan Metge (with Jacinta Ruru), "Kua Tutu te Puehu, Kia Mau: Māori Aspirations and Family Law", in Mark Henagan and Bill Atkin, *Family Law Policy in New Zealand* (3rd ed), LexisNexus, Wellington, 2007.

## C. *Articles Written by Te Mātāhauariki Members in Scholarly Journals (2000–2007)*

1. Richard Benton, "Whose Language? Ownership and Control of Te Reo Māori in the Third Millennium" (2001) 16(1) *New Zealand Sociology* 35.

2. Robert Joseph, "Denial, Acknowledgement and Peace-Building through Reconciliatory Justice" (2001) in Waikato University College, Te Taarere aa Tawhaki: *Journal of the Waikato University College*, Koroneihana, Hopuhopu.

3. Joan Metge, "Returning the Gift: Utu in Intergroup Relations" (2002) 111 *Journal of the Polynesian Society* 311.

4. Joan Metge, "Ropeworks – He Taura Whiri", Waitangi Rua Rau Tau Lecture 2004 <www.radionz.co.nz>

5. Robert Joseph, "Challenges of Incorporating Māori Values and Tikanga under the Resource Management Act 1991 and the Local Government Bill – Possible Ways Forward", in B Midson and G Morgan (eds), *Yearbook of New Zealand Jurisprudence, Vol. 6, 2002–2003*, University of Waikato, Hamilton, 2004.

6. Alex Frame and Paul Meredith, "Performance and Māori Customary Legal Process" (2005) 114 *Journal of the Polynesian Society* 135.

7. Joan Metge, "Working in/Playing with Three Languages: English, Te Reo Māori and Māori Body Language" (2005) in Chis Shore (ed), *Translations, Treaties and Testimonies: The Cultural Politics of Interpretation,* Special Issue, *sites* (New Series) 2(2), 83.

8. Alex Frame, "The Fiduciary Duty of the Crown to Māori: Will the Canadian Remedy Travel?" (2005) 13 *Waikato Law Review* 70.

9. Alex Frame, "Hoani Te Heuheu's Case in London 1940-41: An Explosive Story" (2006) 22 *New Zealand Universities Law Review* 148.

10. Joan Metge, "The Anthropologist as Citizen" (2006) 3(2) *sites* (New Series) 60, Jeffrey Sissons (ed), Special Issue Beyond Ethnography.

11. Alex Frame and Joeliee Seed-Pihama, "Some Customary Legal Concepts in Māori Traditional Migration Accounts" (2006) 12 *Revue Juridique Polynésienne* 113.

12. Richard Benton, with Mere Roberts, Brad Haami, Terre Satterfield, Melissa L Finucane, and Mark Henare, "Whakapapa as a Māori Mental Construct: Some Implications for the Debate over Genetic Modification of Organisms" (2004) (16)1 *The Contemporary Pacific* 1.

13. Robert Joseph, "Whānau mentoring, Māori Youth and Crime" (2007) 11(1) *Childrenz Issues* 26.

## D. *Papers published by Te Mātāhauariki Research Institute as Occasional Papers and made available on the Institute website (2000–2007)*

1. Paul Meredith and Rachel Parr, "Collaborative Cross Cultural Research for Laws and Institutions for Aotearoa/New Zealand", Te Mātāhauariki Institute, *Occasional Paper Series,* Number 1, 2001.

2. Alex Frame, "Property and the Treaty of Waitangi: A Tragedy of the Commodities?", Te Mātāhauariki Institute, *Occasional Paper Series,* Number 2, 2001.

3. Wayne Rumbles, "Africa: Co-existence of Customary and Received Law", Te Mātāhauariki Institute, *Occasional Paper Series,* Number 3, 2001.

4. Leilani Tuala-Warren, "A Study in Ifoga: Samoa's Answer to Dispute Healing", Te Mātāhauariki Institute, *Occasional Paper Series,* Number 4, 2001.

5. Rachel Parr, "Te Mātāhauariki Methodology: The Creative Relationship Framework", Te Mātāhauariki Institute, *Occasional Paper Series,* Number 5, 2001.

6. Robert Joseph, "The Government of Themselves: Case Law, Policy and Section 71 of the New Zealand Constitution Act 1852", *Te Mātāhauariki Institute Monograph*, 2002. (117 pages)

7. Dame Evelyn Stokes, "The Individualisation of Māori Interests in Land", *Te Mātāhauariki Institute Monograph*, 2002. (227 pages)

8. Robert Joseph, "Comparatively Speaking: A Summary Paper for Objective 2", Te Mātāhauariki Institute, *Occasional Paper Series*, Number 6, 2003.

9. Tonga Karena, "Cooking the Potatoes", Te Mātāhauariki Institute, *Occasional Paper Series*, Number 7, 2003.

10. Tui Adams, Richard Benton, Alex Frame, Paul Meredith, Nena Benton, Tonga Karena, "Te Mātāpunenga: A Compendium of References to Concepts of Māori Customary Law", Te Mātāhauariki Institute, *Occasional Paper Series*, Number 8, 2003.

11. Joeliee Seed-Pihama, "Māori Ancestral Sayings: A Juridical Role?", Te Mātāhauariki Institute, *Occasional Paper Series*, Number 10, 2003.

12. Dame Evelyn Stokes, "Ohaaki: A Power Station on Māori Land", *Te Mātāhauariki Institute Monograph*, 2004. (159 pages)

13. Richard Benton (ed), *Conversing with the Ancestors: Concepts and Institutions in Māori Customary Law*, Te Mātāhauariki Institute, University of Waikato, Hamilton, 2006. Proceedings of Te Mātāhauariki Research Institute's Conference at the Fale Pasifika at the University of Auckland, October 2004:

    Introduction: Talking with each other (Richard Benton)
    Chapter 1: Customary Law in a Transnational World: Legal Pluralism Revisited (Anne Griffiths)
    Chapter 2: Lexicography, Law and the Transformation of New Zealand Jurisprudence (Richard Benton)
    Chapter 3: Resident, Residence and Residency in Samoan Custom (Tui Atua Tupua Tamasese Ta'isi Efi)
    Chapter 4: Some Māori Legal Concepts in Traditional Migration Accounts (Alex Frame and Joeliee Seed-Pihama)
    Chapter 5: Towards a More Inclusive Jurisprudence for Aotearoa New Zealand: Te Pū Wānanga 1999–2003 (Nena Benton)
    Chapter 6: Performance and Māori Customary Law (Alex Frame and Paul Meredith)

14. Transcripts of Te Pū Wānanga Sessions and interviews of which audiotapes were made and are held in the University archives:

    # 1 (8 September 1999) Dr Tui Adams

# 2 (23 March 2000) Bishops Manuhuia Bennett and Whakahuihui Vercoe with Mr Te Ariki Morehu

# 3 (28 April 2000) Dr Pakariki Harrison (first session)

# 4 (15 December 2000) Mrs Roka Paora, with Drs Tui Adams and Hirini Melbourne

# 5 (16 March 2001) Sir John Turei with Dr Tui Adams

# 6 (27 September 2001) Mrs Mabel Waititi, with Mr Kevin Prime and Mr Tukaki Waititi

# 7 (28 September 2001) Mr Tukaki Waititi and Mr Kahu Waititi

# 8 (12 July 2002) Dr Merimeri Penfold (second session; first was not recorded)

# 9 (18 March 2003) Mr Henare Te Ua

# 10 (5 April 2003) Dr Pakariki Harrison (second session)

# 11 (27 May 2003) Lady Rose Henare and Mr Erima Henare

# 12 (6 June 2003) Dr Ngapare Hopa

## E. *Addresses, Speeches, and other Presentations made by Members of Te Mātāhauariki Research Institute (1997–2007)*

1. Alex Frame, "A Journey Overland to Taupo in 1849 by Governor Grey and Iwikau Te Heu Heu". Public lecture illustrated with pictures to an audience invited by Ariki Tumu Te Heuheu, Great Lake Centre, Taupo, 1 May 1998.

2. Judge Michael Brown and Margaret Bedggood. Presentation on the Institute's project, "Laws and Institutions for Aotearoa/New Zealand", Australasian Law Teachers Association Conference, University of Otago, July 1998.

3. Robert Joseph, "Bi-culturalism within a Post-Treaty Settlement Context". Paper presented at Te Oru Rangahau Māori Research and Development Conference, School of Māori Studies, Massey University, 7–9 July 1998.

4. Paul Meredith, "Hybridity in the Third Space: Rethinking Bi-cultural Politics in Aotearoa/New Zealand". Paper presented at Te Oru Rangahau Māori Research and Development Conference, School of Māori Studies, Massey University, 7–9 July 1998.

5. Alex Frame, "Property and the Treaty of Waitangi: A Tragedy of the Commodities?". Presentation at the "Property and the Constitution" Conference, Victoria University of Wellington, 18 July 1998.

6. Nan Seuffert, "Bicultural Research Methods in Aotearoa/New Zealand". Presentation to the "Fields of Knowing" Conference at Monash University in Australia, 26–29 August 1998.

7. Robert Joseph, "Post-Treaty Settlement Implementation Issues". Address at the Te Hunga Roia Māori o Aotearoa Conference, University of Waikato, 20–23 August 1998.

8. Alex Frame, "Fictions in the Thought of Sir John Salmond". Lecture for the "Eminent Victorians" Centennial Series, Hunter Building at Victoria University of Wellington, 31 March 1999.

9. Wayne Rumbles, "Eco-indigeneity and the Complex Person: Ways of viewing Conflicts between Environmental Discourse and the Assertion of Indigenous Rights", Paper at the Re-imagining Multiculturalism Conference, Melbourne, Australia, 1–3 October 1999.

10. Justice Taihakurei Durie, "The Treaty in the Constitution". Speech at the "Building the Constitution Conference", Parliament Buildings, Wellington, 7–8 April 2000.

11. Denese Henare, "Can or should the Treaty be replaced?", Speech at the "Building the Constitution Conference", Parliament Buildings, Wellington, 7–8 April 2000.

12. Alex Frame, "Beware the Architectural Metaphor", Speech at the "Building the Constitution Conference", Parliament Buildings, Wellington, 7–8 April 2000.

13. Tui Adams, Alex Frame, Richard Benton, Nena Benton and Paul Meredith. Addresses at the 20th Annual Australian and New Zealand Law and History Conference "Prospects and Retrospects", University of Waikato, 2001.

14. Judge Mick Brown, "We need to have a national Conversation". Presentation at 9th International Conference on Thinking, Auckland, 15–19 January 2001.

15. Alex Frame, "Customary Law and the Modern Legal System of Aotearoa/New Zealand". Staff Seminar for the School of Law, University of Waikato, 21 February 2001.

16. Richard Benton, Alfred Harris and Ngapare Hopa, "Process, Priorities and Accountability in the Approval and Conduct of Research on Genetic Modification". Presentation to the Royal Commission on Genetic Modification at a National Hui, Turangawaewae Marae, Ngaruawahia, on 7 April 2001.

17. Robert Joseph, "Section 71 – Law and History". Paper at the 20th Annual Conference of the Australian and New Zealand Law and History Society, July 2001.

18. Tui Adams, Alex Frame, Richard Benton, Nena Benton, and Mark Henare, made a presentation at Tapeka, Waihi, at the invitation of Tumu Te Heuheu on 21 July 2001. Dr Frame presented images and other material relating to Governor Grey's visit to Pukawa in 1849–50 and the party engaged in discussions with the scholars and artists working on the new meeting house at Pukawa.

19. Robert Joseph. Several presentations to First Nation and other Canadian audiences on Treaty Settlement and other issues in August 2001.

20. Paul Meredith. Presentation at the Te Waka Awhina o Aotearoa Hui on 9 November 2001.

21. Dame Joan Metge, Alex Frame and Paul Meredith. Presentation on the task of compiling Te Mātāpunenga, for the management, staff and invited guests of the National Library, at National Library Auditorium in Wellington on 23 November 2001.

22. Paul Meredith and Alex Frame, "Performing Law: Muru and Hakari". Presentation to the New Zealand Historical Association Conference in Christchurch on 1 December 2001.

23. Paul Meredith and Wayne Rumbles, "The Law of Whiteness". Paper at the Legal Identity Conference in Melbourne, Australia, 10–12 December 2001.

24. Alex Frame gave a speech at Government House, Wellington, on 15 August 2002, on the occasion of the launch of "Grey and Iwikau: A Journey into Custom". The Governor-General, Te Ariki Tumu Te Heuheu and supporting ope from Taupo, many members of the Judiciary, and the Vice-Chancellor of the University of Waikato, Professor Brian Gould, were among the distinguished guests.

25. Paul Meredith and Alex Frame. Presentation describing Institute's work thus far on Te Mātāpunenga to the Annual Conference of the Māori Law Society in Dunedin on 30 August 2002.

26. Paul Meredith, with Judge Caren Wickliffe of the Māori Land Court, and Kahui Maranui (National Māori Land Information Systems Manager), "Access to Customary Law: New Zealand Issues". Presentation at the New Zealand Law Librarians' Conference, 12 September 2002.

27. Judge Mick Brown, "Facing the Future". Address to Public Sector Senior Management Conference on 24 September 2002.

28. Robert Joseph and Tom Bennion, "Māori Values and Tikanga Consultation under the RMA 1991 and the Local Government Bill – Possible Ways Forward". Presentation to the Māori Legal Forum Conference at Te Papa Tongarewa in Wellington, 9–10 October 2002.

29. Alex Frame and Paul Meredith. Presentation the Institute's work thus far on Te Mātāpunenga, to Members of Waitangi Tribunal at their annual conference in Wellington, 10 October 2002.

30. Richard Benton. Presentations and discussions on the subject of Te Mātāhauariki's work at the University of Waikato, Te Papa in Wellington, and at the University of Auckland, November 2002.

31. Richard Benton, "Te Mātāhauariki – the Imminent Dawn: Customary Law in a Globalized Society". Address to the Conference on "Preservation of Ancient Cultures and the Globalization Scenario", International Centre for Cultural Studies (India), 7th Joint Conference, with the School of Māori and Pacific Development, University of Waikato, Hamilton, 22–24 November 2002.

32. Robert Joseph, "Māori Governance". Presentation to a Transparency International meeting in Wellington on 6 December 2002.

33. Robert Joseph, "Indigenous Law and its Impact on Globalisation". Presentation to the Te Ohu Kai Moana Conference, Wellington, 9 December 2002.

34. Alex Frame, "The Treaty of Waitangi and Ultimate Legal Principles". Presentation for Auckland University's Legal Research Foundation Conference, Auckland, 10 June 2003.

35. Alex Frame, "Ultimate Legal Principles". Presentation at symposium on Human Rights and the Treaty of Waitangi, Victoria University of Wellington, 8 July 2003.

36. Paul Meredith and Alex Frame, "The Hard Yards". Presentation at the invitation of senior Te Puni Kōkiri policy analysts (Ben Paki, Tama Potaka, Denese Henare, Dr John Tamahori) at TPK in Wellington on 24 July 2003.

37. Robert Joseph was co-facilitator of several Treaty of Waitangi Health Training Workshops: Te Ara Tika Tuatahi – A way forward, provided for the Waikato District Health Board between 2003 and 2007.

38. Alex Frame was invited to a discussion on 25 November 2003 at the State Services Commission in Wellington by Mr Tia Barrett of the Commission on publicity and public information concerning the Treaty of Waitangi. The contribution was subsequently referred to in the Commission's report.

39. Joan Metge, "The Challenge of Difference". Lincoln Efford Memorial Lecture, Christchurch WEA, 25 May 2004.

40. Joan Metge, "The Treaty of Waitangi – Then and Now". Contribution to a seminar on the Treaty of Waitangi, Cathedral of the Holy Trinity, Auckland, 27 June 2004.

41. Alex Frame made a submission on 12 August 2004 before the Select Committee of Parliament considering the Foreshore and Seabed Bill. Dr Frame presented the Committee with the draft of an alternative Bill. The presentation was the subject of news reports that evening.

42. Joan Metge, with Manuka Henare, and David Williams, also made a submission to the Select Committee of Parliament considering the Foreshore and Seabed Bill in August 2004.

43. Te Mātāhauariki's Research Team presented several papers at the Institute's Conference on "Polynesian Customary Law" at the Fale Pasifika of the University of Auckland, 10–12 October 2004 [See List D, above, for details].

44. Alex Frame and Paul Meredith. Presentation on the nature and methods of Te Mātāpunenga, at the invitation of the Crown Law Office in Wellington, 18 November 2004.

45. Joan Metge. "Working in/Playing with Three Languages", Paper at the ASAANZ Annual Conference in Auckland, 3 December 2004.

46. Joan Metge made a submission to the Parliamentary Select Committee on New Zealand's Constitutional Arrangement in 2005.

47. Paul Meredith and Alex Frame presented separate papers on Māori Land Claims to a Research Wananga held at Te Wananga o Aotearoa, Hamilton, 10 February 2005.

48. Alex Frame ("Constitutional Issues for Government") and Manuka Henare ("Race Relations and Government") were invited speakers at the Capital City Forum in Wellington, 5 March 2005.

49. Joan Metge, "He Iwi Tahi Tatou: The Making of a Nation". Presentation in a discussion series at St Peter's Anglican Cathedral, Hamilton, 1 May 2005.

50. Richard Benton. Address on aspects of Māori Customary Law in a Polynesian context (and the work of Te Mātāhauariki Institute) to the Native Hawaiian Bar Association, Honolulu, 6 June 2005.

51. Joan Metge, "Talking together in a Pacific Way". Addressed to the LEADR Australasian Conference, Sydney, on 1 September 2005.

52. Joan Metge, "Beyond the Pale: The Anthropologist as Citizen". Presentation at the ASAANZ Annual conference, Stout Research Centre, Wellington, 26 November 2005.

53. Robert Joseph, with Materoa Dodd, "Post-Treaty Settlement Governance Challenges: Independent Dispute Resolution for Ngati Awa". Presentation at the World Indigenous Peoples' Conference on Education (WIPCE), University of Waikato, 27 November–1 December 2005.

54. Alex Frame and Paul Meredith, "One plus One equals Three". Invited Paper at "One Country-Two Laws", a Symposium organised jointly by the Department of English and Auckland University Press, Old Government House, Auckland, 22 July 2006. The paper challenged the audience to examine the dynamic process of cultural interaction.

55. Robert Joseph and Tom Bennion, "Māori Tribal Governance". Wānanga presented for the Trustees, Ngāti Raukawa Trust, at Ruakura Conference Centre, Hamilton, 13 December 2006.

56. The symposium "Tūhonohono: Custom and the State", Tainui Endowed College, Hopuhopu, 22-24 June 2007, including contributions by Alex Frame, Paul Meredith, Richard Benton, Robert Joseph and Wayne Rumbles published in this volume.

# A Few Simple Points about Customary Law and our Legal System

Dr Alex Frame

The Tūhonohono gathering, held at Hopuhopu on the great awa Waikato of such importance to the Kīngitanga and the Tainui tribes, brought together many knowledgeable participants to consider its central theme of customary law. It may be of some small use, therefore, if at the outset I try to discuss a few simple points about the place of customary law in our legal system, such as it is at the present time. Some of the points are dealt with more fully in the Introduction to *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law*, a draft of which was made available to participants and which, it is anticipated, will be published formally soon after this record of the Symposium proceedings.

## I. Three "Ultimate Legal Principles"

It was our world-famous jurist Sir John Salmond who observed in his classic work on Jurisprudence that:[1]

> … there must be found in every legal system certain ultimate principles, from which all others are derived, but which are themselves self-existent. Before there can be any talk of legal sources, there must be already in existence some law which establishes them and gives them their authority.

Although there is nothing pre-ordained about this, our New Zealand legal system, as currently understood, would seem to require the tabulation of three such "ultimate legal principles":[2]

> (1) Acts of Parliament in proper form are a source of law;

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1 Sir John Salmond *Jurisprudence* (7th ed, Sweet and Maxwell, London, 1924) at 169–170. Although the work was first published in 1902, the 7th edition was the last published under Salmond's personal control before his death in the same year and is for that reason perhaps the best expression of that author's mature and considered thought. For further discussion, and particularly on Salmond's anticipation of Hans Kelsen's later concept of the "grundnorm", see Alex Frame *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995) at 65-67 and footnote 58.

2 I have elsewhere raised a question whether a time may come when it will be impossible to describe the functioning of the New Zealand legal order without adding a further "ultimate legal principle" concerning the Treaty of Waitangi. See *Grey and Iwikau: A Journey into Custom* (Victoria University Press, Wellington, 2002) at 69.

(2) the common/customary law as declared by the Courts is a source of law;

(3) in the event of conflict between an Act of Parliament and common/customary law, the Act is recognised as prevailing.

It is the second principle which provides an indisputable point of entry for Māori customary law to our legal system. Observers might be forgiven for wondering why the guarantees in the Second Article of the Treaty of Waitangi are not a prior and preferable alternative point of entry, and may be puzzled to learn that, so long as the 1941 decision of the Privy Council in Te Heuheu's case is considered as correctly stating the law, our courts will not directly enforce the terms of the Treaty in the absence of statutory direction. In those circumstances, the domestic legal effect of the Treaty is subsumed under the first ultimate legal principle.[3]

## II. The Common/Customary Law is Found and Declared by the Courts

It is sometimes forgotten that there are only two kinds of law known to legal systems described significantly as "common law systems". We may rely on Sir John Salmond again for a clear statement of the position:

> It was long the received theory of English law that whatever was not the product of legislation had its source in custom. Law was either the written statute law, or the unwritten, common, or customary law. … *Lex et consuetudo Angliae* was the familiar title of our legal system. The common law and the common custom of the realm were synonymous expressions.[4]

The duty of our Judges to discover and declare our common/customary law is explicitly recognised in the oath of office taken by them in which they undertake to: "well and truly serve Her Majesty according to law … [and to] do right to all manner of people after *the laws and usages of New Zealand*".[5]

The importance and indigeneity of New Zealand common law has been further emphasised recently by both Parliament and the Courts. In 2003 Parliament specifically recognised and decreed that New Zealand's final court of appeal

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3 *Hoani Te Heuheu Tukino v The Aotea District Maori Land Board* [1941] NZLR 590; [1941] AC 308 (PC). For an extended discussion of Te Heuheu's case and an argument that it should *not* continue to be regarded as correctly stating New Zealand law, and that the Treaty should be accorded direct legal enforceability in our courts, see Alex Frame "Hoani Te Heuheu's Case in London 1940-41: An Explosive Story" (2006) 22 *New Zealand Universities Law Review* 148.

4 Sir John Salmond, *Jurisprudence*, above n 1, 208.

5 Oaths and Declarations Act 1957, section 18. Emphasis added.

would, in its work of discovering and declaring the common/customary law of New Zealand, consult "New Zealand conditions, history and traditions". Section 3 of the Supreme Court Act 2003 declares the purpose of the Act to be:

> (a) to establish within New Zealand a new court of final appeal comprising New Zealand judges –
>
> (i) to recognise that New Zealand is an independent nation *with its own history and traditions*; and
>
> (ii) to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved *with an understanding of New Zealand conditions, history, and traditions…* [Emphasis added.]

That point was further emphasised by the Chief Justice, Dame Sian Elias in *Attorney-General v Ngati Apa*, more popularly known as the "Foreshore and Seabed case":[6]

> But from the beginning the common law of New Zealand as applied in the Courts differed from the common law of England because it reflected local circumstances (p.652, para.17)
>
> Any prerogative of the Crown as to property in foreshore or seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances. Maori custom and usage recognising property in foreshore and seabed lands displaces any English Crown Prerogative and is effective as a matter of New Zealand law unless such property interests have been lawfully extinguished. The existence and extent of any such customary property interest is determined by application of tikanga. (p.660, para 49)

## III. There are Four Requirements for Customary Law to be Accepted and Declared by the Courts

Sir John Salmond once more provides the assistance needed to identify the four tests which must be satisfied for custom to operate as a source of law for our courts.

(1) "[A] custom must be reasonable";

(2) "[A] custom must not be contrary to an Act of Parliament";

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6 *Attorney-General v Ngati Apa* [2003] 3 NZLR 577. This was not a new approach. A well-known example, nearly a century earlier, is provided by Chief Justice Stout in *Baldick and Others v Jackson* (1910) 30 NZLR, 343.

(3) The custom "must have been observed as of right. A merely voluntary practice, not conceived as based on any rule of right or obligation, does not amount to a legal custom and has no legal operation";

(4) "[C]ustom, to have the force of law, must be immemorial … custom was immemorial when its origin was so ancient that the beginning of it was beyond human memory…".[7]

If more ancient authority be required for the tests, resort may be made to the pithy statement, still in Law French, from the *Case of Tanistry* in 1608:[8]

> Et issint briefement, custome est un reasonable act, iterated, multiplied & continued per le people, de temps dont memory ne court. (Translation: In brief, custom is a reasonable rule, followed consistently and continuously by the people from time immemorial.)

It will be seen that these tests preserve both the supremacy of Parliament as recognised in the third ultimate legal principle listed above, and, through the requirement of "reasonableness", the moral integrity of the legal system as a whole. I should perhaps, however, say a little about the requirements of reasonableness and "immemoriality".

First as to "reasonableness". As Fritz Kern pointed out in his masterly study of conceptions of law in the Middle Ages:[9]

> … long-usage does not prove a practice to be rightful. On the contrary. "A hundred years of wrong make not one hour of right," and Eike of Repgow in the *Sachsenspiegel*, for example, emphasised that slavery, which originated in force and unjust power, and was a custom so ancient that "it is now held for law," was only an "unlawful custom". The existence of an unlawful or "evil" custom for so long a time shows that usage or age cannot make or reveal law.

The "good old law" clung to so tenaciously by our forbears had to be both *old* and *good* to be law, and it is this second test which has been entrusted to the judges in the form of the modern requirement of "reasonableness".

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7 The above paragraph is a digest of Sir John Salmond's exposition at pages 217-220 of his *Jurisprudence* (7th ed, 1924). For a fuller account of the authority for, and application of, these tests, see Alex Frame *Grey and Iwikau: A Journey into Custom*, above n 2, Section VII 'Revaluing Custom as a Source of our Law', at 63-76.

8 *Case of Tanistry* 80 Eng. Rep. 516 (1608), quoted in EK Braybrooke, "Custom as a Source of English Law" (1951), 50 Michigan Law Review 71 at 73.

9 Fritz Kern *Kingship and Law in the Middle Ages*, transl. SB Chrimes (Basil Blackwell, Oxford, 1968) at 150. The work was first published in German in 1914 and first published in English translation in 1939. Pocock recommends its quality.

Secondly, Sir John Salmond is clear that the original meaning of "time immemorial" for the purpose of establishing custom as law was that the custom be "so ancient that the beginning of it was beyond human memory, so that no testimony was available as to a time when it did not exist".[10] But English law substituted "legal memory" for this human memory and fixed the year 1189 (the date of accession to the throne of Richard I ("Richard Coeur de Lion") as the date at which memory ceased. There is no reason, however, for applying this idiosyncratic rule of thumb to Māori customary law, which must accordingly be considered under the original and more general meaning of immemoriality identified by Sir John Salmond.

A second point about the immemoriality requirement is that it does not preclude development and modification of custom. This dynamic aspect of customary law has been well recognised by the common law courts, as is shown with respect to Māori custom concerning adoption by the Privy Council in *Hineiti Rirerire Arani v Public Trustee* in 1919, where Lord Phillimore said:[11]

> It is … abundantly clear that Native custom, and especially the Native custom of adoption … 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 changed circumstances of the Maori race to-day.

The New Zealand-born political philosopher JGA Pocock first published his work on "The Ancient Constitution and the Feudal Law" in 1957, and reissued it in 1987 with a "Retrospect".[12] Its central method derived from the realisation that the thoughts and actions of ancient times could only be understood if the world in which they occurred were "resurrected" and described in detail. Pocock saw the paradox presented by these two sides of customary law – its constant adaptation and its timelessness. His resolution for the paradox was to quote Hale's old argument of a ship totally replaced in materials over its life still being the same ship: "If the law can remain the same when the whole of its content has been altered, it must be the continuity of the process of law-making which counts."[13]

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10 Salmond, above n 1, at 220.

11 *Hineiti Rirerire Arani v Public Trustee* NZPCC 1840-1932. See also the interesting statement by Lord Phillimore that "the maories as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs…". For further discussion see *Grey and Iwikau*, above n 2, at 72.

12 JGA Pocock *The Ancient Constitution and the Feudal Law: Reissue with a Retrospect* (Cambridge University Press, Cambridge, 1987).

13 Ibid, at 176.

## IV. A Definition of Customary Law for *Te Mātāpunenga*

Te Mātāhauariki Institute researchers, under the guidance of Judge Michael Brown, the late Dr Tui Adams, and a very distinguished Advisory Panel. have grappled from the beginning with the formulation of a definition of "customary law" which did not exclude norms which were "spiritually sanctioned" rather than directly physically enforced by the group or tribe. The Editorial Board of *Te Mātāpunenga* finally settled on the following:[14]

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

It may be useful if I sketch the process by which that definition took shape. The Editorial Board began with Hoebel's helpful proposal that:[15]

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

But even Hoebel's definition, while displaying a commendable departure from the tendency of mainstream 19th-century Western jurisprudence to insist on "commands" and "sovereignty" before conferring the status of "law", still clung to "physical force" as the hallmark and sine qua non. What then of a norm the breach of which was believed by both the offender and the social group to lead on to "supernatural" punishment? Hoebel's definition would deny it legal status. The Board pondered Lon Fuller's question:[16]

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

The Board considered that adding the consequence of "the construction of serious social disadvantage" might broaden the definition so as to capture that circumstance, as it considered was necessary to fully represent the Māori legal order.

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14 *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law*, Introduction.

15 E Adamson Hoebel *The Law of Primitive Man: A Study of Comparative Legal Dynamics* (Harvard University Press, Cambridge, Massachusetts, 1954) at 28.

16 Lon Fuller *The Morality of Law* (Yale University Press, New Haven, Connecticut, first published in 1964, revised ed 1969) at 109.

## V. The Impossibility of Ranking Customary Concepts and Institutions on a "Primitive/Sophisticated" Scale

My friend and colleague Paul Meredith and I have pointed out that use of a supposed "primitive/sophisticated" scale for customary legal concepts and institutions is inappropriate because a particular set of criteria is necessarily chosen by which to measure "sophistication":[17]

> Other criteria could be proposed which might produce different orderings. For example, if social cohesion were taken as the measure, or economic cost, then legal systems might be placed at different positions on the scale. Systems in which law consisted of technical legal signals administered by expensive specialist groups of judges, lawyers, and policemen might be seen as "primitive" when compared to "sophisticated" systems capable of functioning effectively without either.

I have tried to provide an example to illustrate the futility of attributing "primitivity" and "sophistication" in an account of Māori customary legal principles encountered by Governor Grey and his party on their journey overland to Taupō with Iwikau Te Heu Heu in the summer of 1849–1850. In discussing the Māori theory of obligation in relation to *taonga*, founded on the active and personal role of *hau*, it was concluded that: "This system need no policemen, courts, or bailiffs, since the taonga themselves serve as enforcers."[18]

A modern Minister of Justice – and his or her colleague in charge of the Treasury – might be very interested in such a system! Far from appearing "primitive", such a system might on examination prove to be very "sophisticated". As proposed earlier, all would depend on the criteria adopted.

## VI. The So-Called Issue of "Genuine" versus "Spurious" Custom, and the General Charge that Custom is made up to Suit

Customary law has its critics. Some legislators, inclined towards codification of law, tend to regard customary law as a perplexing and complicating intrusion upon the clear geometry of their architectural plans, and are happy to take

17 Alex Frame and Paul Meredith "Performance and Maori Customary Legal Process", 114 Journal of the Polynesian Society 135, at 139.

18 *Grey and Iwikau*, above n 2, 59-61.

every opportunity to sweep it away.[19] Some judges, perhaps forgetting the origins of the common law in custom, have come to see that body of law as judge-*made*, rather than as judge-*found*. Some jurists and commentators have expressed suspicions that customary law is simply "made up" by claimants with axes to grind or interests to pursue. This last matter is discussed in the Introduction to *Te Mātāpunenga*, where the authors state that:

> The business of argument based on customary law – and for that matter on written codes – is to present an outcome which is faithful to what are urged to be the fundamental values of the society. Of course that will involve appeals to a "Golden Age", and of course there will be attempts to "edit".[20] On the other hand, the business of adjudicators, scholars, and the collective memory of society (however that may be stored, whether in venerable tomes or in traditional genealogies and song) is to identify and denounce fabrications or false pleadings, without stifling the necessary dynamism of customary law.

So the answer to the detractors and critics of customary law is twofold. First, that our constitutional arrangements require courts to seek and declare it in accordance with well-understood and coherent tests allowing and requiring the sifting out of false or doubtful claims and permitting the abandonment of "unreasonable" custom, such as norms or practices contrary to modern human rights norms. Secondly, that the value of customary law lies in its balancing of the well-accepted "top-down" law-creating powers of a legitimate legislature with the "bottom-up" recording and development of customary law. We do not reject the undoubted utility of rational law making, but seek to balance its value against the danger that legal "architects" may lose touch

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19 I have elsewhere contrasted this "architectural" approach to law making, which aims at clearing the legal deck ready for the grand new vision of the law-maker, with a more "archaeological" approach aimed at uncovering the historical concepts and values of the society concerned. See "Making Constitutions in the South Pacific: Architects and Excavators" in David Carter and Matthew Palmer (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) 277.

20 If an example be demanded from the early colonisation period in New Zealand, see FD Fenton's "The Laws of England Compiled and Translated into the Māori Language by direction of His Excellency Colonel Thomas Gore Browne, C.B., Governor of New Zealand" (Auckland, 1858). In that work, which attempted to summarise the origins and content of English law, Māori were told that:

> A wise and generous people, the English, have settled in his land; and this people are willing to teach him, and to guide him in the well-made road which themselves have travelled for so many generations; that is *the path of the perfected law* – in the path by which themselves have attained to all the good things which they now possess; wisdom, prosperity, quietness, peace, wealth, power, glory, and all other good things which the Pakeha possesses… (p. ii)

Few jurists, or citizens, would have described the state of English law in the mid-19th century as "perfected".

with that reservoir of support and determination in the hearts of the people without which law becomes an alien imposition, to be abandoned as soon as circumstances permit.

# Sharing the Basket: Delivery Options for Te Mātāpunenga

Wayne Rumbles

## I. Introduction

The work of *Te Mātāpunenga* was always envisaged to be shared with a wider audience. As stated by Dr Alex Frame, a member of the editorial Board of *Te Mātāpunenga*:[1]

> It is envisaged that the "end users" of *Te Mātāpunenga* will be members of Māori communities, students at all levels within New Zealand, Government at many levels of policy and decision-making, and judicial officers across the range of Courts and Tribunals. It is also envisaged that the compilation will be of interest to international scholars seeking an understanding of Māori Customary law.

This chapter explores some of the options to achieve delivery of *Te Mātāpunenga* to these end users and briefly identifies some issues to be considered. *Te Mātāpunenga* has had a long gestation and has been the topic of discussion in some form or other at nearly every Advisory Panel meeting of the Te Mātāhauariki Research Institute. Many of those discussions centred on the people who were going to use the material and how it was to be delivered.

### A. *Publicly available*

All of the source material on which *Te Mātāpunenga* draws is publicly available, and it is presented in a manner where any potential user can go directly to the sources and draw their own conclusions. In many ways it is study reference and is not being held up as the definitive source but rather a starting point for discussion and dialogue, which was indeed one of the founding principles of Te Mātāhauariki.[2] The researchers were mindful of

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1 Alex Frame and Paul Meredith "Performing Law: Hakari and Muru" in *Te Mātapunenga: A compendium of References to Concepts of Māori Customary Law* Te Mātāhauariki Institute Occasional Paper series, Number 8 (Te Mātāhauariki Institute, Hamilton, 2003) 49 at 51.

2 See Rachel Parr *Te Mātāhauariki Methodology: The Creative Relationship Framework* Te Mātāhauariki Institute Occasional Paper series, Number 5 (Te Mātāhauariki Institute, Hamilton, 2002).

tension between Western concepts of public domain knowledge[3] and the kaitiaki interest in respect of taonga works and mātauranga Māori.[4]To negotiate this tension all research was undertaken by a bicultural and bilingual team,[5] applying the "Creative Relationship Framework" as outlined by Rachel Parr in *Te Mātāhauariki Methodology: The Creative Relationship Framework*.[6] The material was continually 'tested' through Te Mātāhauariki's advisory panel meetings and the Institute's Pū Wānanga programme of consultations and discussions with senior Māori leaders and scholars.[7]

## B. *Copyright*

As the then Foundation for Research, Science and Technology (FRST) funding supported Te Mātāhauariki for more than 10 years, the editorial board of *Te Mātāpunenga* considered what was to become of the work beyond the FRST funding.[8] An agreement between the editorial board of Dr Alex Frame, Professor Richard Benton and Paul Meredith, Te Mātāhauariki Institute and the University of Waikato was entered into. The agreement in short states that any intellectual property rights which may reside in "the concept, scheme, arrangement, or accompanying explanations in the work shall reside with the Institute so long as it subsists and thereafter in the University". On assignment of such rights the editorial board will retain right of attribution.[9] Therefore, although Te Mātāhauariki Institute no longer has a physical existence, there is ongoing wairua to see *Te Mātāpunenga* disseminated to contribute to "development in Aotearoa/New Zealand of a 'common law' which reflects the concepts and values of both our major founding cultures".[10] The spirit of the aforementioned allocation of rights is that the work will be publicly available to as wide an audience as possible.

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3 For a general discussion on public domain see Rosemary Coombe "Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property" (2002) 52 DePaul L Rev 1171.

4 *Ko Aotearoa tēnei: a report into claims concerning New Zealand law and policy affecting Māori culture and identity* Wai 262 (Waitangi Tribunal, Wellington, 2011) at 38.

5 Paul Meredith and Rachel Parr *Collaborative Cross Cultural; Research for Law and Institutions for Aotearoa/New Zealand: A Summary Paper* Te Mātāhauariki Institute Occasional Paper series, Number 1 (Te Mātāhauariki Institute, Hamilton, 2001).

6 Parr *Te Mātāhauariki Methodology: The Creative Relationship Framework*, above n 2.

7 For further discussion of Pū Wānanga see Nena Benton "Towards a More Inclusive Jurisprudence for Aotearoa: Te Pū Wānanga 1999–2003" in Richard Benton (ed) *Conversing with the Ancestors* (Te Mātāhauariki Institute, Hamilton, 2006).

8 On 1 February 2011 the Foundation for Research, Science and Technology and the Ministry for Research, Science and Technology merged into the new Ministry of Science and Innovation (MSI). See www.frst.govt.nz/ for further details.

9 In line with part 4 of the Copyright Act 1994.

10 Frame and Meredith "Performing Law: Hakari and Muru" above n 1, at 49.

### C. *Methods of dealing with corrections, additions and deletions*

In the spirit of creating that discussion and dialogue already mentioned it would be ideal for a work such as *Te Mātāpunenga* to be able to respond to that discussion. The work should be viewed as a living document, which will grow and evolve over time, and this was always the vision for *Te Mātāpunenga*. Any project that deals with people's practices will be open to question regarding both the choice of material and the interpretations of (albeit contemporary) third parties. There is also a probability or perhaps certainty that further material will turn up which will add to, alter the nuance of or contradict material in *Te Mātāpunenga*.[11] This is especially true when knowledge is derived from an oral culture. In an oral culture abstract knowledge, such as concepts of justice and social order, are contained in a pre-existing network of knowledge, interconnected in extraordinarily complex and non-linear ways. Consequently, a practitioner of Māori customary law could have assumed that the audience would have the framework of knowledge that sits behind the practice.[12] Therefore, ideally any delivery system for *Te Mātāpunenga* would be able to deal with and respond to this legitimate feedback. A further point to note is that there can be no assumption of prior understanding of the supporting pillars of a customary practice for *Te Mātāpunenga*. Indeed, part of the aim of *Te Mātāpunenga* is to create the foundational basis in order to assist in the understanding of contemporary expressions of Māori customary law.

## II. *Te Mātāpunenga* – Some Delivery Options

There are a number of publishing options available; dissemination no longer relies on just hard-copy books. Each publication option presents issues and benefits and these should be considered in light of the aims of *Te Mātāpunenga* to facilitate dialogue and understanding, and it may well be that a combination of delivery methods best meets these aims.

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11 For an example of contested knowledge see in the area of biodiversity Arturo Escobar "Whose Knowledge, Whose nature? Biodiversity, Conservation, and the Political Ecology of Social Movements" (1998) 5 Journal of Political Ecology 53.

12 Doug Brent "Oral Knowledge, Typographic Knowledge, Electronic Knowledge: Speculations on History of Ownership" (1991) 1(3) Ejournal <www.ucalgary.ca/ejournal/archive/rachel/v1n3/article.html>.

### A. *Hard copy*

To publish in the form of a hard-copy book does have a certain amount of prestige and status. A hard copy makes citation straightforward and would facilitate its use in court and other legal situations.[13] A hard copy also has an aesthetic that is difficult to reproduce in the other forms of publication, and recent research shows a hard copy is more likely to be shared and discussed than other digital forms.[14] In some ways a hard-copy book encapsulates the knowledge in familiar form that is easy to have on a bookshelf in the office, library or classroom. Once a book has a publisher, it is relatively straightforward to distribute and recover costs and profits (presuming it sells). A book is also easy for libraries to purchase, being a one-off cost.

The difficulty with a hard-copy book is that it will be a large publication with many colour plates and is therefore relatively expensive to print. This, combined with the small print run (in a global sense), means that the cost of such a hard-copy publication would be outside the reach of many in the community and even of some small law firms.[15] With a hard copy the material is static and can only respond to its audience and updates through the expensive republication of successive editions. Although a loose-leaf publication overcomes the necessity of republication in it entirety, it is best suited to materials that are updated on a regular cycle and does increase both the initial price and has ongoing subscription costs.

### B. *Digitisation*

If *Te Mātāpunenga* is digitised and access is delivered online, *Te Mātāpunenga* would contribute to the rapidly increasing process of digitisation as a means of preservation and/or improving access and knowledge of cultural heritage collections.[16] While the source material used in *Te Mātāpunenga* is publically available, not all of it is digitally available and therefore digitisation would

13 Although the use of digital legal materials is increasing and becoming widely accepted in our courts and for legal research, much of this is digital copies of existing hard-copy material. See, for example, the online resources/databases of LexisNexis <www.lexisnexis.co.nz/>, Brookers <www.thomsonreuters.co.nz> and Westlaw <www.westlawinternational.com/>.

14 Steven Chen and Neil Granitz "Adoption, Rejection, or Convergence: Consumer Attitudes toward Book Digitization" (2011; July) J Bus Res.

15 See Nick Holmes "Legal Publishing at the Crossroads" (2009) 9 *Legal Information Management*, 172 at 173 for a general discussion about the rising costs of legal publishing and increasingly the cost being prohibitive for small law firms wanting to purchase these titles.

16 Kirsten Francis and Chern Liew "Digitised Indigenous Knowledge in Cultural Heritage Organisations in Australia and New Zealand: An Examination of Policy and Protocols" (2010) 46(1) *Proceedings of the American Society for Information Science and Technology* <http://onlinelibrary.wiley.com/doi/10.1002/meet.2009.145046025/pdf>.

significantly alter the accessibility to some of its source material. A further consideration is that what is public domain for one culture may be sacred or restricted for another.

As Francis and Liew point out:[17]

> The digitisation of Indigenous cultural information presents an interesting dichotomy of cross-cultural relationships between an ideology from a liberal Western ideology which developed from the 19th century, and an Indigenous point of view; this intersection has been called by a leading researcher in the field, Martin Nakata, as the "cultural interface".

While this cultural interface does present opportunities for preservation, dissemination and understanding of knowledge and history for both indigenous and non-indigenous peoples, we need to be mindful of the words of the Joint Statement from the Indigenous World Association and Indigenous Media Network of the UN Commission on Human Rights in 2005:[18]

> Our collective traditional knowledge is the very foundation of our cultures. It is indivisible from our identities and our laws, institutions, value systems and cosmo visions.[19] It derives and develops from our daily interaction with our ancestral territories. Thus, the protection, preservation and development of our knowledge cannot be separated from our right to maintain and strengthen our distinctive spiritual and material relationship with our lands, territories, inland waters and coastal seas.[20]
>
> Indigenous cultures provide for rules and regulations on communicating, sharing, using and applying traditional knowledge. These rules and regulations are cultural obligations we have to comply with and are part of our own customary laws. Our distinctive spiritual and material relationship with our ancestral territories and their environments contains similar duties and responsibilities that we need to attend to when using plants, animals or other living beings for our own needs.

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17 Ibid.

18 Joint Statement from the Indigenous World Association and Indigenous Media Network "Review of Developments Pertaining to the Promotion and Protection of the Rights of Indigenous Peoples, including their Human Rights and Fundamental Freedoms: Principal theme: "Indigenous peoples and the international and domestic protection of traditional knowledge" E/CN.4/Sub.2/AC.4/2005/CRP.3 (2005).

19 See: Statement of the International Indigenous Forum on Biodiversity at the Ad Hoc Open-Ended Working Group on Access and Benefit Sharing (Bonn, Germany, 22–25 October 2001) para. 6.

20 See also: The Kimberly Declaration; International Indigenous Peoples Summit on Sustainable Development (Khoi-San Territory, Kimberley, South Africa, 20–23 August 2002) para. 3.

> Also, future generations are strong rights-holders in our cultures and our responsibility for their rights and well-being requires us to meet specific obligations on their behalf.
>
> Our cultural obligations towards communicating, sharing, disseminating, using and applying our knowledge should be legally recognized and respected by the non-Indigenous actors of the Information Society.

While the compilers of *Te Mātāpunenga* were aware of this sentiment in the production of the material, it is also hoped that *Te Mātāpunenga* will contribute to understanding and recognition of customary law within the legal arena.

All forms of digitisation carry the risk that the material will be copied and even if copy protection methodologies are implemented these are likely to be able to be circumvented within a relatively short period.[21] However, this point should not be overstated as even with hard-copy publication all illicit copying cannot be successfully restricted, especially in light of most scanners being able to scan direct to pdf format ready for digital delivery.

For most digital delivery systems the end user does not own or possess the material but rather has access to the material.[22] It is the point of access which provides opportunities for cost recovery, either as pay per view or a subscription model.[23] Digitisation can occur with a number of technologies.

### 1. *Compact disc*

A compact disc (CD) is in many ways like a book in digital form. Unlike a book, a CD would require access to a computer but not necessarily the internet. The production of a data CD is relatively cheap, although in practice a CD of printed material is as expensive as, or even more expensive than, hard-copy printed material because of pre-production costs. A CD can easily be created in a manner which provides hyperlinks throughout the material connecting related terms, allowing a reader to instantly navigate to associated material. A CD could also be linked to external sites and online material; for example,

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21 Casey Chisick and Mark Perry "Copyright and Anti-Circumvention: Growing Pains in a Digital Millennium" (9 June 2000) NZIPJ 261 at 262.

22 This is not the case for CD delivery which in this respect is more like a hard-copy book but may also be covered by a licence.

23 Viktors Berstis and Maria Himmel (2001) "Royalty Collection Method and System for use of Copyrighted Digital Material on the Internet" United States patent US 6,282,653 B.

direct links to some of the sources.[24] This type of hyperlinked navigation encourages deeper understanding of the material and exploration beyond the linear.[25]

However, like a hard-copy book the material is static and like books can only respond to its audience through a new edition.[26] A CD is cheaper and faster to produce but still requires distribution to subscribers.

### 2. *Webpage – static*

Material could be hosted on a static (non-interactive) website. If access to the material is to be free, once set up a website like this can be left with very little management. In many ways this is very similar to the CD and can provide hyperlinks inside the document in order to follow links and connections, as well as links to outside sources. This type of archiving of the material could be hosted on our own website (www.lianz.waikato.ac.nz) or by some third party such as the University of Waikato Research Commons (http://researchcommons.waikato.ac.nz/).

When a new edition is ready it could be quickly and easily updated. However, unlike the CD and hard copy, by using a static website the material could be incrementally updated. That is, one section or entry could be updated at a time.

Even with a relatively static website, there are ongoing costs involved with hosting and maintaining the site. Therefore, it is necessary to have a continuing commitment to the publication from an institution or publisher.

### 3. *Webpage – interactive*

A model which is becoming more prevalent on the internet for dissemination of material is the interactive website. The interactivity can be at the level of the material with a higher level of linkages within and external to the material such as the National Library Digital Collections (www.natlib.govt.nz/collections/digital-collections) and the Encyclopedia of New Zealand (www.teara.govt.nz/en).

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24 For example, a link could be made to the Maori Newspapers <www.nzdl.org/cgi-bin/library?a=p&p=about&c=niupepa&l=mi&nw=utf-8> allowing users to instantly refer to sources where they have an active internet connection.

25 Isabelle De Ridder "Visible and Invisible Links" (2002) 6(1) *Language Learning and Technology* 123.

26 It is true that some publications such as Encyclopaedia Britannica and World Book use online updates to update the original material.

Alternatively, the interactivity can be between the material/institute/university/publisher and the audience, where the audience or end users can comment and even perhaps contribute to the content. This option does require a further level of commitment, because no matter what the level of public involvement there is a requirement of some sort of moderation to avoid possible liability arising from comments posted by what can be anonymous contributors.

The amount of public participation can range from:

- simply supplying an email address for comments such as we do on the Te Mātāhauariki site (www.lianz.waikato.ac.nz);
- a Q&A page such as Chicago Manual of Style Online (www.chicagomanualofstyle.org/CMS_FAQ/new/new_questions01.html);
- online forums and discussions such as the Traditional Knowledge portal (www.cbd.int/tk/forum/);
- specific discussions/comments linked to entries (www.ip-watch.org/weblog/index.php?p=479&res=1024_ff&print=0).

### 4. *Wiki*

Wikis are perhaps the most interactive options of all, where the public are able to edit and add material directly to the site. The most famous of this type of site is Wikipedia (http://en.wikipedia.org), where members of the public can contribute to the collective knowledge of the community. While a wiki can be a very open system, it can also have any level of editorial filter before public publication on the web, but any level of editorial function requires constant commitment.[27] While wikis are being used within disciplines in the academy or institutions only a few external academic-focused wikis exist.[28] For example, Citizendium (http://en.citizendium.org) was developed as a more rigorously fact-checked alternative to Wikipedia. However, as of 2011 it has only passed 156 expert-approved articles through the vetting process since it was created in 2006.[29] Another example is Scholarpedia (http://www.scholarpedia.org), which only accepts articles from experts in their field and all articles are peer-reviewed prior to publication, making it more like a traditional journal or encyclopaedia than a true wiki. Although there have been a number of

27 See, for example, the LexisNexis Academic Product Wiki <wiki.lexisnexis.com/academic/index.php?title=Main_Page>.

28 Steve Kolowich "Whither the Wikis?" (14 July 2010) *Inside Higher Ed* <www.insidehighered.com/news/2010/07/14/wikis>.

29 Date accessed 16 November 2011. There is a backlog of 15,893 articles in various stages of development.

articles professing the credibility of Wikipedia and the like, the fact remains that wikis have a credibility problem. This perception is especially true in the academy and I would suggest this also permeates the legal profession.[30]

## III. Conclusion

While these options are still to be navigated, if a work such as this is to achieve its greatest audience and utility, in my opinion it requires a level of interactivity that balances both the integrity of the material with ease of access and connection to its audience. It may be that to achieve this some form of hybrid delivery system is adopted, something like *Adams on Criminal Law (Adams)*.[31] *Adams* is delivered in hard copy (albeit periodically updated in loose-leaf form), and parts of the larger work are reproduced for specific purposes.[32] In addition or in conjunction with the hard-copy form, *Adams* is also published online (which is constantly updated) and on CD. While such an extensive multi-delivery platform may not be necessary, in my opinion the ideal delivery for *Te Mātāpunenga* would be some form of complete[33] or condensed hard-copy book in conjunction with some form of moderated interactive online delivery.

30 See, for example, Aniket Kittur, Bongwon Suh and Ed Chi "Can you ever trust a wiki?: impacting perceived trustworthiness in Wikipedia" *CSCW '08 Proceedings of the 2008 ACM conference on Computer supported cooperative Work* (ACM, New York, 2008) 477, "An Empirical Examination of Wikipedia's Credibility" (2006) 11(6) *First Monday* <http://frodo.lib.uic.edu/ojsjournals/index.php/fm/article/view/1413>; and Andrew George "Avoiding Tragedy in the Wiki-Commons" (19 March 2007) Available at SSRN: <http://ssrn.com/abstract=975096>.

31 See Brookers <www.thomsonreuters.co.nz/catalogue/>. As I teach Criminal Law I am most familiar with this product. There are other examples of multiple format delivery systems for content.

32 For example, Jeremy Finn *Adams on Criminal Law 2011 Student Edition* (Thomson Reuters, Wellington, 2010).

33 At the time of writing, it appeared likely that a complete hard-copy edition of *Te Mātāpunenga* would be prepared for publication in 2012.

# *Te Mātāpunenga* as a Compendium of the History of Ideas

Dr Richard A Benton

*Te Mātāpunenga* is a collection of annotated references to the concepts and institutions of Māori customary law. For convenience, each reference has been placed under one of 122 separate headings, referred to in the work as Titles; many entries, of course, could logically appear under any of several alternative Titles, and they are cross-referenced accordingly. The Titles are essentially a list of key words, 125 in all (three have dual referents: *tuakana/teina*, *pepeha/whakataukī*, and *tāhae/whānako*). Four of the words are early adoptions from other languages, three from English (*kōti*, *kāwanatanga*, *kawenata*) and one (*ture*) from Hebrew via Tahitian; another seven are derivatives or elaborations of base terms which themselves constitute the head word for a discrete Title. This leaves a net total of 114 key terms of local or Polynesian origin. Each Title is prefaced by a note on the etymology of the word and its range of meanings in modern Māori, and, in many cases, a guide to entries in *Te Mātāpunenga* as a whole which relate to the use or implications of the term concerned. In this preliminary material other terms related to the topic under discussion are also mentioned explicitly: there are about another hundred of these, but they are distributed very unevenly (more than 30 are associated with slavery and servitude, for example), and will not be considered further in this discussion.

This paper will look briefly at the origins of the 114 local and inherited Polynesian terms used in the Titles, and what they tell us about the development of ideas pertaining to customary laws and institutions in Aotearoa New Zealand.

## I. From Taiwan to Madagascar and Rapanui

The Polynesian settlement of this part of the Pacific marked humanity's conquest of the last habitable frontier: once the first sustainable settlements had been established, the only truly unexplored territories would be those where long-term survival for human beings isolated from the rest of the world would be impossible. Polynesian languages form the south-eastern branch of the Austronesian language family, a group of about 1300 contemporary languages spoken natively in an area from Madagascar in the west to Rapanui (Easter Island) in the east. Austronesian speakers left the Asian mainland, presumably from somewhere in what is now southern China, about 6,000

years ago, and established themselves on the island now known as Taiwan. From there, groups of them pushed south into the Philippines, and, over the ensuing centuries, continued southwest to Borneo, Sumatra, Java, the Malay peninsula and beyond; south through the Celebes; and southeast to the Bismarck Archipelago and northern coastal areas of the island of New Guinea. This latter wave of migrant Austronesian speakers seem to have paused long enough in their new homeland (which had already been settled by completely different peoples some twenty to thirty thousand years earlier) to develop a distinctive language and culture, now labelled "Oceanic". Over ensuing generations this was carried progressively further into the Pacific, with modifications at each stage of the journey, eventually reaching an area traditionally called Pulotu, somewhere in the Fiji group.

From there it was carried to Polynesia, where its speakers were the first human settlers. They arrived in Tonga (probably first) and Samoa during the first millennium BC, and were well-established as a separate linguistic group ("Proto-Polynesian") about 2,500 years ago. After a few hundred years, as populations grew and contact became more sporadic, linguistic differences became more marked, and a new language, labelled by linguists "Proto-Nuclear-Polynesian", emerged, centred on Samoa. Speakers of this language eventually sailed further into the Pacific, colonising first the Society, Tuamotu and Marquesan islands (around AD 400), and within the next six to eight centuries pushing east to Rapanui, north to Hawaii, and (probably lastly) settling Aotearoa. Contact with Rapanui seems to have been lost soon after it was settled, and although occasional two-way voyages to Aotearoa, with the Kermadecs as a stopover point, may have been made for a while, direct contact between this part of the world and the rest of eastern Polynesia also seems to have been soon lost. Hawaii became similarly isolated by about AD 1200.

The relationship between languages is discovered, in large part, by carefully studying their vocabulary and comparing this with the vocabularies of other languages, neighbouring and more distant. Languages are grouped together on the basis of the innovations which they share, after known adoptions from other languages (whether related or not) are discounted. Often a "basic vocabulary" list is used in order to discover and index immediate relationships, but the entire vocabulary of a language is available for providing evidence of what may have been inherited from earlier stages. This process involves noting similarities and differences in sound as well as meaning between words thought to be related, and building up ordered pathways which account for changes in form between different stages of a language. It will often end up that the likely form of an earlier stage is reflected in different ways among cognate forms in later stages (those in which the particular earlier form is reflected). For example, the Proto-Malayo-Polynesian word for "sky", reconstructed

as *langit, is a word which survives apparently unchanged in Philippine languages like Ilocano. Polynesian languages have "lost" the final consonant in inherited words, leaving *langi as the Proto-Polynesian reconstruction. Within Polynesia, Proto-Polynesian *l is retained in that form in Hawaiian, while *ng becomes *n, giving us *lani*; in Māori Proto-Polynesian *l becomes "r", and *ng is retained as a velar nasal (except by Tūhoe and Ngāi Tahu speakers), so we have *rangi* as the reflex of **langit* and cognate of *lani*. It can get much more complicated than that, but in all cases a clear rule-governed progression must be demonstrated before we can say with reasonable assurance that words are cognate with those in another language or reflexes of a parent language.[1]

The actual meaning of the ancestral word is determined by one or both of two complementary methods: taking the current meanings of reflexes in different branches of the language group in question and assuming that those which are very similar or identical reflect the original meaning of the term (the "lexical method"), or looking at all the known meanings, working out logically what they have in common and why they might be different, and determining the probable original meaning on the basis of this analysis (the "semantic method"). Often either approach will yield a similar result, and in any case it must be remembered that in the absence of direct evidence from another source (which we do not have in regard to the earlier stages of Polynesian and most other Austronesian languages) our labels are at best well-informed guesses. We are also very dependent on the quality of the information available to us. Many linguistic reconstructions are made on the basis of dictionaries, some of which are excellent sources of information with wide-ranging examples of the uses and nuances of various words, and others of which are highly selective

1 A good, concise explanation of the methods used by historical and comparative linguists to reconstruct previous stages of a language and determine the relationships among languages is given in the Introduction to Malcolm Ross et al. *The Lexicon of Proto Oceanic: 1. Material Culture* (Research School of Pacific and Asian Studies, Australian National University, Canberra, 1998), pp. 1-16. For discussions of the "semantic" and "lexical" methods, see Robert A Blust "Lexical reconstruction and semantic reconstruction: the case of Austronesian 'house' words", 4 *Diachronica* 1-2 (1987) at 31-72, Isidore Dyen and David F Aberle *Lexical Reconstruction: The Case of the Athapaskan Kinship System* (Cambridge University Press, London, New York, 1974), and R David Paul Zorc "Austronesian culture history through reconstructed vocabulary (an overview)" in AK Pawley and MD Ross (eds) *Austronesian Terminologies: Continuity and Change* (Department of Linguistics, Research School of Pacific and Asian Studies, Australian National University, Canberra, 1994) pp. 541-594. Many of the etymologies discussed in this paper are drawn from material presented in the POLLEX computer database compiled by Bruce Biggs and Ross Clark (Department of Applied Language Studies and Linguistics, University of Auckland, ongoing) and Robert A Blust's Austronesian Comparative Dictionary (Computer File, Department of Linguistics, University of Hawaii, 1995).

and minimally informative word lists. Even the most parsimonious word lists will help us establish relationships, but they may obscure deeper links between ideas which would only be revealed by a much more detailed description.

## II. Aotearoa: A Laboratory for the Study of Lexical Innovation and Change

The late Professor Bruce Biggs observed that "New Zealand would seem to provide a laboratory for the study of lexical innovation and change. It was settled a thousand years ago …, and, for eight hundred years, was, as far as we know, not in contact with any other language".[2] In that article he looked at two sets of vocabulary: "that of canoe culture (which persisted in New Zealand), and coconut culture (which was lost)". He points out three ways of dealing with this: coining new words, adapting existing words, and taking words from other languages. The last was not an option in New Zealand, and of the remaining options, adaptation was favoured over invention. (Many of the apparent coinages may well be adaptations, too: for example, *whakataukī* ["proverb"], a local invention, may be a rearrangement of inherited components.) In the new environment language will be adapted to reflect changes, and to fill gaps: a richer physical or cultural environment will motivate people to create new words and expressions; one less rich than they had previously known will usually lead to the loss of vocabulary referring to objects and ideas no longer relevant, especially in cases like New Zealand before the 18th century, where there was no writing and no interaction with people from distant places to keep memories of some phenomena alive. Thus, 12 of the 13 terms associated with canoe culture present in East Polynesia were retained in Māori, with similar or new meanings, but only half the coconut terms, all of which were given altered meanings (for example, *niu*, derived from the ancient word for a coconut tree, came to mean a slender wand used in certain ceremonies, and, much later, was applied to a pole also erected for ceremonial purposes).

The patterns described by Professor Biggs are reflected also in the terms selected as Titles for *Te Mātāpunenga*. The rows in the table below cover eight stages in the progression from Taiwan to Aotearoa.[3] The earliest, Proto-

2 Bruce Biggs "New words for a new world", in AK Pawley and MD Ross (eds) *Austronesian Terminologies: Continuity and Change* (Department of Linguistics, Research School of Pacific and Asian Studies, Australian National University, Canberra, 1994), 21 at 21.

3 An excellent overview of the Austronesian expansion from Taiwan into South-east Asia and the Pacific will be found in Peter Bellwood, James J Fox and Darrell Tryon (eds) *The Austronesians: Historical and Cultural Perspectives* (The Australian National University, Canberra, 1995); see especially Chapter 2 by Darrell Tryon. The expansion into and within Polynesia is outlined in Patrick Vinton Kirch and Roger C. Green *Hawaiki, Ancestral Polynesia* (Cambridge University Press, Cambridge, 2001) at 77-81.

Austronesian, covers the initial foray from Taiwan to the Philippines. Each of these words has come down in some recognisable form to contemporary languages in several major branches of the family, including at least one of the aboriginal languages of Taiwan. The second stage is Proto-Malayo-Polynesian. These words seem to have been invented when those Austronesian speakers who settled in the Philippines lost touch with those who stayed in Taiwan; they are widely dispersed throughout the Austronesian family, but they are not reflected in any known Taiwanese language. The next set combines those from the time Malayo-Polynesian speakers heading south-east became separated from those in the Philippines and also separated from the others heading south and west through what is now Western Indonesia and Malaysia. This is when the "Proto-Oceanic" language developed from an earlier Eastern Malayo-Polynesian idiom. The fourth set comprises the words which seem to have appeared first as the Oceanic Austronesian speakers headed through the island chains of the Southern Solomons and Vanuatu towards Fiji. We next have a group of words labelled "Proto-Polynesian". These have cognates in several major branches of the Polynesian family, including the subgroup of which Tongan and Niuean are the most prominent members. The original forms of these words can be assumed to have been present in the language spoken when the Polynesians first settled the islands that now constitute Tonga and Samoa. Later, a distinct language, Proto-Nuclear-Polynesian, developed in and around Samoa. Speakers of this language settled Eastern Polynesia, again developing their own distinctive language and eventually spreading out in various directions from the Tahiti-Tuamotu-Marquesas heartland, probably colonising Rapanui before the linguistic split was complete, and then settling Hawaii, the Cook Islands and Aotearoa. In time, all of these settlements developed their own distinctive idioms, and the final row indicates the number of words which were developed or modified here. One of the last mentioned (not included in the Table) is the word *Mātāpunenga* itself. It is drawn from a coinage by Te Taura Whiri i te Reo (the Māori Language Commission), combining two elements not found elsewhere: *mātā* "filled, packed with" and *punenga* "useful knowledge", to provide an equivalent for "encyclopaedia".

The columns summarise the nature of the relationship. The first shows the number of words than can ultimately be traced to a particular stage of the language. The second indicates the more immediate source of the Māori term, if its meaning has changed significantly along the way. For example, the modern Māori word *tuakana* "older sibling of the same sex" is thought to be a reflex of Proto-Malayo-Polynesian **churang* "in-law". The reflex of this word in Proto-Oceanic, **ngkangka*, or possibly **kaka*, had acquired the sense of "same sex sibling", and had been prefixed with *tua-* and suffixed with the pronoun **-na* "his/her" by the time it was inherited by Proto-Polynesian (and later by Māori) in the form **tuakana* "older same-sex sibling". This

word has been counted as "Proto-Malayo-Polynesian" in its origin, but with Proto-Polynesian as its more immediate source. The third column relates to the particular senses in which the word is used in *Te Mātāpunenga*. In the case of *tuakana*, this is still close to the reconstructed Proto-Polynesian meaning, so it is included in that tally. However, many other words inherited from or through Proto-Polynesian are included in the "Māori" total, because the way their meaning has been modified in relation to laws or institutions seems to be unique to Māori. An example is *taniwha*, from the Post-Philippine stage leading to Proto-Oceanic, thence through Proto-Polynesian where, judging from the reflexes in most modern Polynesian languages, it referred to a large species of shark. However, its distinctive meaning in Māori is not apparent in those earlier stages or in the modern Polynesian cognates. (If you are wondering how monsters come to be included in *Te Mātāpunenga*, read the entries under that Title!)

***Origins of Māori terms in Te Mātāpunenga***

| *Language stage* | *Ultimate source* | *Source of current meaning (general)* | *Source of specialised ("legal") meaning* |
|---|---|---|---|
| Proto-Austronesian | 10 (8.8%) | 4 (3.5%) | 2 (1.8%) |
| P-Malayo-Polynesian | 9 (7.9%) | 5 (4.4%) | 1 (0.9%) |
| Oceanic | 13 (11.4%) | 8 (7.0%) | 3 (2.6%) |
| Eastern Oceanic | 9 (7.9%) | 7 (6.1%) | 1 (0.9%) |
| Proto-Polynesian | 25 (21.9%) | 30 (26.5%) | 15 (13.2%) |
| P-Nuclear-Polynesian | 9 (7.9%) | 12 (10.5%) | 6 (5.3%) |
| Eastern Polynesian | 15 (13.2%) | 24 (21.0%) | 22 (19.3%) |
| Māori (local) | 24 (21.0%) | 24 (21.0%) | 64 (56.0%) |

Thus, at most less than a quarter of the words heading *Te Mātāpunenga* Titles are completely home-grown, but almost half the rest have, as far as we can tell, taken on distinctly local connotations.

## III. The Persistence of Memory

It is very likely that other language groups also share some apparent Māori innovations, but this has not yet been revealed by dictionary-makers and may also have been overlooked by ethnographers. Furthermore, even with the information that we do have, some of the words whose contemporary meanings are assigned to a later stage of the history of the language (in the third column) may arguably reflect meanings that were already present in still earlier stages, as illustrated by the discussion of some of the words inherited from Proto-Austronesian, below. Words are constantly sifted, refined and recycled as they are passed on from one generation to the next. Thus, although the referents and nuances of many of the earlier words have been altered, the words themselves have not been discarded, and the threads of meaning

are still strong enough for their disparate forms in contemporary languages to be traced back to a common source. In the case of Māori, the influence of Eastern Polynesia is particularly strong, with more than a fifth of the concepts highlighted in *Te Mātāpunenga* closely aligned in form and content to their Eastern Polynesian counterparts, and another fifth directly reflecting ideas and practices from earlier stages of Polynesian and wider Austronesian history. There is thus a strong conservative current flowing through the language in which the concepts of customary law are expressed, accompanied by a notable degree of adaptation and innovation. Old ideas have been retained and modified while new ideas have been developed. If we are to understand them fully, it is important to know something about the history of these ideas, and also how they have developed in other parts of the Polynesian and wider Austronesian worlds. The etymological information provides a starting point for this voyage of discovery.

Many of the old ideas are very pervasive, and some, like *mana* and *tapu*, have been powerful enough to spread well beyond their Polynesian, Oceanic and remoter Austronesian homelands. They have been ideas waiting for the world to discover. Others, like *mā* "shy, ashamed, embarrassed" have retained the same meaning over five or six millennia. This word, from Proto-Austronesian **ma-siaq*, through Proto-Oceanic **maRa*, appears in Māori in the causative form *whakamā*. The idea, however, is far more widespread than the word itself. Shame has the same social meaning in many Austronesian societies; it is frequently expressed by another reflex of the same original term, such as the Tagalog word *hiya*. Another theme embedded in the lexicon is what James Fox has called "the concern for origins" as a prime marker of social identity.[4] This is illustrated in the kinship terms, only three of which are present in *Te Mātāpunenga*, but which are numerous, complex and almost all inherited from earlier stages of the language and maintained with meanings virtually unchanged from those elsewhere in Eastern Polynesia. It also is implicit in the status of the *ariki* (from Proto-Polynesian *qariki*, "chief"), the first-born in a lineage who is endowed with spiritual power and potentially, at least, political authority.

## A. *Blending the New with the Old*

In the enumeration in the table, the only reflexes of Proto-Austronesian words to be counted as having come into Māori with their original meaning intact are *whakamā*, discussed above, and *hara*, from **salaq* "wrong, error". This word has been inherited by many languages, including Māori, applied to mistakes and infringements of the social or moral order for which the perpetrator may

4 James J Fox "Austronesian societies and their transformations", in Bellwood, Fox and Tryon (eds) *The Austronesians*, above, n 3, 214 at 222.

be held culpable or accountable by a human or supernatural agency. However, several other words also appear to reflect very ancient ideas. These include two, *mauri* "the life force" and *tupu* "grow, develop", to which we will return at the conclusion of this discussion.[5] Firstly, however, we can look at four other terms, *hoko* "trade, exchange", *whenua* "land; afterbirth", *waka* "canoe", and *tangihanga* "mourning ceremonies", along with two compound terms, *kawe mate* and *tūrangawaewae*.

*Hoko*. The immediate source of this word, to convey the notion of the exchange of goods and/or services, is the Proto-Nuclear-Polynesian word **soko*. The cognate forms in Rapanui and Rarotongan Māori, Marquesan, Tuamotuan and Tahitian have meanings practically identical with Māori *hoko*. It is possible that the word comes from a Proto-Malayo-Polynesian root, **dheket*, reflected in Proto-Eastern Oceanic as **soko*, which has been glossed as "together, collectively". This word is thought to be the origin of Proto-Polynesian **soko* "to join" – a meaning retained in its cognates in Tongan and Samoan. However, this meaning is not associated with *hoko* in Eastern Polynesian languages, although the idea of collective action or association is.

*Whenua*. This word has two complementary meanings: (1) land, ground or country; and (2) placenta or afterbirth. The first of these meanings comes from Proto-Austronesian **banua* "settlement" through Proto-Oceanic **panua* "land, earth, village, house" and Proto-Polynesian **fanua* "land". The second sense seems to have arisen in Polynesia, where the reflexes of **fanua* also denote placenta (or, in Rapanui, the uterus). The linguistic connection between land on the one hand and collective and personal identity on the other is particularly strongly marked in Eastern Polynesia, where the proto-word **fenua* (clearly a variant of the Proto-Polynesian form) assumed the meanings of "land", "country" and "placenta".

*Waka*. Historical linguists are unsure of the true origin of the Māori word waka, although its antiquity is undisputed. It is derived either from a Proto-Austronesian word **wangka* or **wangkang*, "boat", or from a later word, dating from the time the Eastern Malayo-Polynesian language was evolving into Proto-Oceanic, and also, confusingly, **wangka*, denoting a canoe. Those opting for the later origin argue that the other **wangka* was originally a Chinese word which spread within the Western Malayo-Polynesian languages after the East-West split had taken place. Whatever its origin, the Māori word denotes a canoe, and by extension any vehicle for transporting people and goods, and also those who have been carried together; for example, the crew of a canoe, or a tribe (people descended from one or more members of a large sea-going

5 The material presented in this part of the paper is drawn from the various Titles in *Te Mātāpunenga*, modified and augmented for the purposes of the discussion.

canoe transporting their ancestors). The connotations of a tribe or descent group are shared directly with other Eastern Polynesian languages. However, the association of canoes or boats with common descent or community is found throughout Austronesia, although the words used may not necessarily be cognate with each other (for example, in the Philippines the smallest unit of local government is called a *baranggay*, a word with an original meaning of "the crew of a boat").

*Tangihanga*. This is the nominalised form of the verb *tangi*, which has a general sense of giving forth a sound of a sustained and plaintive or musical nature, and with specific meanings covering to cry, weep over, weep for, mourn, or singing a lament. While this word's Proto-Austronesian credentials are impeccable, its appearance in *Te Mātāpunenga* is an example of a local innovation in the word's application. It refers to the circumstances or occasion of mourning, and the customs related to this. The root word can also be used as a noun to denote a lament or the process of lamentation and mourning. The term *tangihanga* is derived from Proto-Austronesian **tangit* "weep, cry" through Proto-Polynesian **tangi* (by which time the additional connotation of giving forth a sound, as noted above, was also present), combined with the Proto-Polynesian suffix *-tanga*. The use of this term to denote an institution is probably unique to Aotearoa.

*Kawe mate*. Literally "bringing the death", this phrase denotes the custom of relatives of a deceased person (especially if they are from a noted family) visiting the marae or communities from which people came to the *tangihanga* for the deceased. The visits normally take place within a few weeks or months from the burial, and enable the whānau, hapū or iwi concerned to thank mourners from other districts, remember and pay tribute to the deceased person, and, on occasion, to return symbolic gifts presented by the group visited at the tangi. The phrase itself seems to have developed in Aotearoa. The component words are inherited, *mate* (from Proto-Austronesian **macey* "die", and *kawe* "convey, go to get, bring", from Proto-Polynesian **kawe* "to carry something").

*Tūrangawaewae*. This word again does new things with old components. Compounded from the nominalised form of the word *tū* "stand" (from Proto-Austronesian **tuqed* "be standing") and *waewae* "foot, leg" (from Proto-Austronesian **waqay*, with the same meaning). This expression appears to be comparatively recent, first used by biblical scholars to translate the word "footstool", or in the literal sense of "a place to put the feet". It later came to mean "a place to stand as of right", and became a common expression for one's home marae, especially as alienation of traditionally held land left many people with no other foothold in their tribal homeland. The historian

Michael King (2003) notes that this sense of the term gained wide currency after Princess Te Puea chose the name "Tūrangawaewae" for the national marae she established at Ngāruawāhia.[6]

## B. *The Essence of Life*

In conclusion, let us consider two terms, *mauri* "life force" and *tupu* "grow, develop", the first of which has attracted considerable attention from scholars, and the other whose wider ramifications have often been overlooked.

*Mauri* was a central notion in Māori philosophy, although in its abstract sense of "the essence which gives a thing its specific natural character"[7] it had almost faded from memory by the 1960s,[8] only to make a very strong resurgence in recent years, especially in discussions on genetic modification and the natural environment. The meaning of the word is difficult to grasp because it encapsulates two related but distinct ideas: the life principle or essential quality of a being or entity, and a physical object in which this essence has been located. Williams[9] (1971) defines the abstract sense of the term first as "life principle", and equates the human manifestation of abstract mauri with "the thymos of man". The Greek notion of the mortal, but immaterial, *thymos*, embracing consciousness, activity, rationality and emotion (in contradistinction with the immortal but more quiescent *psyche*) probably parallels Māori thought on this aspect of *mauri* (and its contrast with the notion of *wairua*) as accurately as is possible in a brief English definition. There is certainly no single English word to express this concept. Joan Metge's definition, quoted above, covers the wider sense of the abstract connotations of mauri well; it is important to remember that the kinds of "thing" which the mauri integrates include ecosystems and social groups as well as objects and individuals. From the abstract senses of mauri come the expressions *mauri ora* (vital or living mauri – sometimes equated with "person"), *mauri rere* (fleeing mauri – "panic stricken"), and so on. The concrete representations or depositories of the *mauri*, particularly that of a cultivation, productive area of forest, fishery, community or social group, were also called *mauri*; when both the abstract and physical symbol were being discussed at the same time, the term *ariā* might be used for the concrete aspect of mauri. (It should be

6 Michael King *Te Puea: A Life* (2nd ed, Reed, Auckland, 2003) at 104-105.

7 Joan Metge *The Maoris of New Zealand: Rautahi* (Routledge & Keegan Paul, London, 1976) at 57.

8 Ibid. Joan Metge noted in this 1976 revised edition of *The Maoris of New Zealand* (first published 1967) that while still believed by "many older Maoris", this notion "no longer has general currency, probably because it was not reinforced by Christian beliefs, as *tinana* and *wairua* were".

9 Herbert Williams *A Dictionary of the Māori Language* (7th ed, Government Printer, Wellington, 1971).

noted that in some recent writing, the terms *mauri* and *wairua* seem to be used interchangeably; this was not the case in the 19th century, by which time the notions of "life essence" and "spirit", still combined in the cognates of *mauri* in some other Polynesian languages, had been separated in Māori thought.)

This is an ancient term, derived from the Austronesian **qudip* "to live", through Oceanic **ma'udip* (incorporating the stative prefix *ma-*) to Proto-Polynesian **ma'uri* "live, life (principle), alive". In modern Polynesian languages, cognate terms occur in Samoan (*mauli*, "seat of the emotions"), Hawaiian (*mauli* "life, seat of life, spirit", also Mauli Ola, a name for the god of health who is also called on to protect the integrity of a new household) and Rarotongan (with a similar range of meanings); the term has been refined and deepened as a technical philosophical notion in Aotearoa. However, this deepening and refining is not something unique to Māori, and it may well be that the term, which has been treated in the Table as of Austronesian origin but with a locally evolved meaning, is, even in the way that it is used in Māori, Austronesian in both form and content. The Proto-Austronesian root word, **qudip*, has reflexes in at least 235 daughter languages,[10] some at least of which, even in their dictionary definitions, seem very close in meaning to the Māori term. For example, in Old Javanese the word (*hurip*) is glossed "life, give life, bring to life, grant life (not kill)" and in modern Javanese (*urip*) as "life; to live, be alive; soul, spirit, inner life". Despite the fact that their speakers had been out of contact for at least four millennia, the evolution of the term in Māori, Javanese and other languages seems to have followed the same trajectory. Looking at these data in his Austronesian Comparative Dictionary, Robert Blust comments:[11]

> Dempwolf [the pioneer exponent of the relationship between the various branches of the Austronesian languages] reconstructed **qudip* "to live", and although this semantic reconstruction is justified, it appears incomplete in a number of respects due to differences in the "conceptual focus" … of the German/English and Austronesian terms.

After discussing the "dominance of vitality" conveyed in the use of the reflexes of this term in so many Austronesian languages, he observes that:

> If anything in English reminds us of this conceptual focus it is perhaps the depiction of the life force in Dylan Thomas[12]
>
> > The force that through the green fuse drives the flower
> > Drives my green age …

10 Robert A Blust Austronesian Comparative Dictionary (Computer File) (Department of Linguistics, University of Hawaii, 1995).

11 Ibid, entry for *qudip.

12 Dylan Thomas *Collected Poems 1934-1952* (JM Dent & Sons, London, 1952) at 9.

Dylan Thomas did not have a name for this force; the Austronesians did, and their heirs still do. Professor Blust discusses the extended meanings of the term in many Austronesian languages, including the word's use in connection with sneezing (as in the Māori expression *Tihe! Mauri ora*), which "undoubtedly derive from formulaic expressions wishing health or protection from the loss of the soul". He goes on to say:[13]

> Although this is substantially similar to traditional European beliefs, the different emphasis of the Austronesian term in comparison with the English term is seen again in the recurrent references to healing, curing, reviving and recovering (where the life force is reasserting not merely its presence, but its dominance).

In Māori, at least, the local reflex of **qudip*, *mauri*, has received a lot of attention from linguists, anthropologists and other scholars. But another term, *tupu* "grow, develop", has so far received intensive examination (as far as I am aware) from only one. It has been overlooked, I think, because of its apparent ordinariness. Yet the intensive examination of original texts, the kind of activity on which *Te Mātāpunenga* is based, and which it seeks to stimulate, often reveals an extraordinary richness in the way in which such words are used.

In Māori, the word *tupu* (in Eastern dialects, *tipu*) has a core meaning of growth and increase. It also covers development, social position and the realisation of potential. It originates from Proto-Malayo-Polynesian **tumbuq*, through Proto-Eastern Oceanic **tumpu* and Proto-Polynesian **tupu*, with an apparently constant sense at each stage of "grow, spring up". The scholar who brings *tupu* into sharp focus is the Danish anthropologist J Prytz Johansen. He characterises *tupu* as "Life in its essential meaning, life which is worth living, the strength and courage of life thus are identical with honour. Life and honour constitute an indissoluble whole: 'tupu'..."[14] and later notes that[15]

> What is most interesting ... is the fact that *mate*, weakened, when referring to human beings is point by point the counterpart of *tupu*. *Tupu* may mean "arise, come into existence" and "mate" may mean "to be dead". Just as *tupu* includes the meanings of "thriving" and "gathering strength", so *mate* may denote all degrees of "being weakened". The context must decide how bad things are. ... *Mate* thus is the opposite of the vitality and spirit contained in *tupu*.

Again, the Māori usages of this term in its philosophical applications are paralleled by those in other Austronesian languages. Robert Blust reports that:[16]

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13 Above n 10. J Prytz Johansen, *The Maori and His Religion in Its Non-Ritualistic Aspects* (Ejnar Munksgaard, Copenhagen, 1954) at 48.

14 Johansen, *The Maori and His Religion in Its Non-Ritualistic Aspects*, at 48.

15 Ibid, at 49.

16 Blust, Austronesian Comparative Dictionary (above n 10),entry for *tumbuq

> reflexes [of **qudip*] in Malayo-Polynesian languages show recurrent references to vegetation and to growth, a component of meaning which is reinforced by the observation that **qudip* has been replaced in a number of the languages of Sulawesi by reflexes of **tumbuq* "to grow".

In Māori, and probably other languages, the reflex of **tumbuq* has been given meanings complementary to **qudip*/*mauri*, to express further insights into the nature and ordering of life and living.

## IV. Sailing Beyond the Reef

The addition of the etymologies to the definitions provided for each Title provides an opening into a wider world, still largely unexplored. The material within the compendium illustrates the waxing (and in some cases the waning, through forgetfulness and lack of use) of the scope and significance of the ideas which the key words encapsulate. There is even more to be learned, however, about the history of these ideas though exploring their correlates in the other languages of the Pacific, South-east Asia and Madagascar which share with Māori a common Austronesian heritage. Many of the concepts underpinning Māori customary law have an ancient history, and their future development, their *tupu*, can only be enhanced by an awareness of how the rest of Austronesia has come to regard these matters.

# Early Conceptions of the State in New Zealand

Professor John Farrar

The early history of New Zealand is very complex and there is a natural tendency to focus on the Treaty of Waitangi and to seek in this a legitimation of the modern state. A consequence of this is that we seek to impose Western concepts on Māori which do not fit. The concept of the state in fact has a complicated history within the Western legal tradition.[1] Originally, references to state or *status regni* simply referred to situation.[2] Justinian's Corpus Juris talked about the *Status Rei Romanae*.[3] It was not until the 15th century that lawyers began to develop the corporate legal personality of the state. In the case of English law this was even more confused in the equation of the concept of the state with the Crown. The Crown starts off with the person of the King or Queen and was then analysed in terms of a corporation sole.[4] This maintained the office when the King or Queen died. It is only in modern times that the Crown has been thought of as a corporation aggregate.[5] At the same time, public international law has recognised a concept of the state for its purposes.[6] This requires a permanent population, a defined territory, government and capacity to enter into relations with other states. Thus we have a poor fit between the domestic conceptions and the conception of public international law.

1 See DB Goldman, *Globalisation and the Western Legal Tradition* (Cambridge University Press, Cambridge, 2007) at 155 et seq, Chapter 7.

2 Ibid., 116.

3 Ibid.

4 See Sir John Salmond *Jurisprudence* (7th ed, Sweet & Maxwell, London 1924) at 351 et seq.

5 For a thorough modern discussion see Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) Chapter 16, 583 et seq. For differing views in the House of Lords see *Adams v Naylor* [1946] AC at 543, 555 and *Town Investments Ltd v Dept of the Environment* [1978] AC at 359, 400.

6 See Vaughan Lowe *International Law* (Oxford University Press, Oxford, 2007) at 136 et seq. See the Definition in Article 1 of the 1933 Montevideo Convention on Rights and Duties of States.

The role of the state has changed over time and it is necessary to evolve theory which takes adequate notice of these changes[7] and not be bogged down in some archaic legalism. Any theory of the modern state in New Zealand needs to take into account its distinctive history and the special role of the Treaty of Waitangi.

## I. The Origins of the State

Aristotle in his *Politics*[8] emphasised the beneficial nature of the state as a form of social organisation.

The idea of the modern state developed in the Renaissance[9] and early theories were based on the state of nature and the need for a social contract leading to the state.[10] Common law theorising put this in terms of sovereignty.[11] The late Professor HLA Hart in his *Concept of Law*[12] identified what he called "the minimum content of Natural Law".[13] In doing so he drew on Hobbes and Locke. He identified five truisms which led to law and the state. These were:

(1) human vulnerability

(2) approximate equality

(3) limited altruism

(4) limited resources and

(5) limited understanding and strength of will.[14]

These led as a matter of "natural necessity" to the state. By this he meant that they afforded practical reasons for its existence.

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7 See HM Government (UK) *Building on Progress: The Role of the State* (Public Services, London, 2007); See generally J Wolff *An Introduction to Political Philosophy* (Oxford University Press, Oxford, 2006) Chapter 2; Norman Barry *An Introduction to Modern Political Theory* (4th ed, Palgrave Macmillan, London) Chapter 3.

8 See B Russell, *History of Western Philosophy* (2nd ed, Routledge, London, 1961) at 196, 197.

9 Goldman, above n 1, at 115 et seq.

10 See T Hobbs, *Leviathan* (JM Dent and Sons Ltd, London, 1651); JCA Gaskin (ed) *The Elements of Law Natural and Politic, Part II De Corpore Politico* (Oxford University Press, Oxford, 1994).

11 Hobbes *Leviathan*, Chapter XVIII.

12 HLA Hart *Concept of Law* (2nd ed, Clarendon Press, Oxford, 1994), at 193–200.

13 Ibid., at 199.

14 Ibid., at 193-198.

## II. The Development of the State in Aotearoa New Zealand

Māori tribes had no concept of the state before the arrival of the Pākehā.[15] Each iwi was a separate organisation with its own sub-classifications into hapū. There were alliances from time to time but these were fairly loose and at other times there was warfare. It is probably correct to say Māori lived in a state of nature[16] in Hobbesian terms. To impose upon them the confused Western concepts was an act of ethnocentrism.[17]

### A. *The United Tribes of New Zealand*

Originally, the ethnocentrism was well intended. James Busby[18] convinced chiefs to adopt a flag as the United Tribes of New Zealand in 1834 so that Māori ships could be recognised by international maritime laws. He persuaded 35 of them to enter into a confederation and to make a Declaration of Independence in 1835. Other Māori chiefs went along with this but did not participate actively in the decisions. The immediate concern of Busby was to ward off the French and the Americans who were beginning to appear on the scene with their own imperialistic notions.

Whatever the degree of Māori involvement and whatever the strict juridical position, the English colonial office accepted the efficacy of these documents[19] and the necessity to enter into a treaty relationship with Māori to justify their presence and the acquisition of sovereignty over New Zealand. The instructions of Lord John Russell to Captain Hobson were to protect the welfare of Māori but not necessarily to recognise their laws and customs.[20]

### B. *The Treaty of Waitangi and Declaration of Sovereignty*

After some heated discussions on the previous day, resulting in the redrafting of a text originally written in English but explained in Māori, a Māori-language document was drawn up and presented by Hobson as the representative of the Queen of England to assembled chiefs, mostly from northern hapū, at Waitangi

15 See Elsdon Best *The Maori As He Was* (Government Printer, Wellington, 1974) Chapter 5, at 93-100. See also note 16 below and the materials cited.

16 See Sir William Martin *Ko Nga Tikanga A Te Pakeha* (Printed at the Church Mission Press, 1845); James Busby *Remarks Upon a Pamphlet Entitled "The Taranaki Question" by Sir William Martin* (Southern Cross Office, Auckland, 1860) at 7-8.

17 See Busby, above n 16, at 8.

18 See E Ramsden *Busby of Waitangi: HM's Resident at New Zealand, 1833-40* (Wellington, 1942); Paul Moon and Peter Biggs *The Treaty and its Times – The Illustrated History* (Resource Books, Auckland, 2004) Chapter 4, at 85 et seq.

19 Moon and Biggs, above n 18, at 103-104.

20 See extracts in Moon and Biggs, above n 18, Chapter 7.

in the Bay of Islands on 6 February 1840, many of whom decided to sign it after further debate, with others adding their signatures later. This document, the only one actually signed at Waitangi and thus the only real "Treaty of Waitangi", was later supplemented by an English-language approximation (labelled by the economist Brian Easton as the "Treaty of Waikato Heads"[21]). This English approximation, which did indeed appear to be a deed of cession rather than an agreement about governance (a plausible reading of the Māori text), was later to gain a status equal to if not greater than the Māori text. Whether the original Treaty was a "solemn covenant", a "simple nullity", or something in between, has yet to be resolved definitively, but it remains a powerful force in New Zealand politics and inter-ethnic relationships.[22]

Three months after signing the Treaty of Waitangi Hobson began what FM Brookfield[23] argues was the British Crown's at least partly revolutionary seizure of power when he issued his Declarations of Sovereignty, claiming the North Island on the grounds of cession and the South Island on the grounds of discovery. This despite the fact that clearly not all the North Island tribes had acceded to the Treaty, and few if any of those who had regarded it as a deed of cession in the sense proclaimed by Hobson. This pre-emptive strike by the Crown has been followed up, in Brookfield's view, by a series of revolutions and counter-revolutions up to very recent times.[24]

### C. *New Zealand as a Crown Colony*

The immediate impact of the Treaty was that the British treated New Zealand as a Crown colony.[25] Originally, it was regarded as falling under the Governor and Legislative Council of New South Wales but a UK Act authorised the Crown by Letters Patent to create a separate colony.[26] This step was taken on 16 November 1840 when the Letters Patent known as the Charter of 1840 were issued.[27] This document stipulated that the three principal islands should

21 Brian Easton "Was there a Treaty of Waitangi? Was it a social contract?" Archifacts (April 1997) 21.

22 See, for example, Brian Easton above n 21; R Benton "Truth and the Treaty of Waitangi" (2007) Te Mātāhauariki Newsletter 7, at 9; Richard Dawson *The Treaty of Waitangi and the Control of Language* (Institute of Policy Studies, Victoria University of Wellington, 2001); Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books, Wellington, 1987); Human Rights Commission *Mana ki te Tiriti – Human Rights and the Treaty of Waitangi* (Human Rights Commission, Wellington 2003); FM Brookfield *Waitangi and Indigenous Rights: Revolution, Law.& Legitimation* (Auckland University Press, Auckland, 2006).

23 Brookfield, above n 22, at 97.

24 Ibid., at 108-135.

25 See generally AH McLintock *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958).

26 Ibid., at 49, 54, 57.

27 Ibid., at 99.

be known respectively as New Ulster, New Munster and New Leinster. Eight days after issue of the new Charter, Captain Hobson was appointed Governor in Chief with the usual powers and prerogatives. He had the assistance of an executive council and constituted a legislative council with full power to enact laws and ordinances, "for the peace, order and good governance of New Zealand".[28] The early approaches were sympathetic to Māori but were overtaken by events.

In 1825 the New Zealand Company had been formed to colonise New Zealand.[29] Prior to the Charter referred to above, there was talk of a charter to be given to the New Zealand Association, formed in 1837, and in 1839 the bodies were merged to form the New Zealand Land Company. In these activities Edward Gibbon Wakefield, a controversial but talented man who had been imprisoned for abducting a 15-year-old heiress, was the driving force.[30] The New Zealand Company organised a land-buying expedition and emigrant ships arrived in Port Nicholson.[31] From then on the future of New Zealand governance became increasingly complex. This started with the absence of government in Port Nicholson and the attempt by the settlers to deal with a vacuum.[32] They adopted a provisional constitution which constituted a primitive republic.[33] They took the trouble to have this ratified by Māori chiefs of the district.[34] When this came to the attention of Captain Hobson, he regarded it as high treason and took steps to issue a proclamation making it clear that Crown colonial government applied.[35] There was a degree of vehemence which entered into the relationship and there began calls for greater Pākehā involvement in government.

From the beginning there was ambiguity of how far English Law could apply to the circumstances. To assist the process Chief Justice Martin[36] wrote *Ko Nga Tikanga A Te Pakeha*, which was published by the Church Mission Press in 1845. This is more a philosophical piece about the basic approaches of English Law than a digest of laws. Martin described it as a "Letter to you to explain the Rules of the Pakeha for the administration of justice in various

28 See M King *The Penguin History of New Zealand* (Penguin Books, Auckland, 2003) at 196.
29 King, above n 28, at 171 et seq; P Temple *A Sort of Conscience – The Wakefields* (Auckland University Press, Auckland, 2003) at 188 et seq; GW Rusden *History of New Zealand* (2nd ed, Melville, Mullins & Slade, London, 1895), Vol 180 et seq.
30 See generally Temple, above n 29, passim; Rusden, above n 29, Vol 1 at 180.
31 Temple, above n 29, at 249 et seq.
32 Ibid., at 275.
33 Ibid; Rusden, above n 29, at 215.
34 Temple, above n 29, at 275; Rusden, above n 29, at 192.
35 Ibid.
36 *Ko Nga Tikanga A Te Pakeha* (Church Mission Press, Auckland, 1845). For a version of this see *The Maori Messenger* of 31 March 1856, at 4-10.

cases, and for several other things". These were "good rules for the people who desire to live quietly". When Martin returned to England due to ill health it was republished in *The Maori Messenger* of 31 March 1856. There are different versions of it.

1. The *New Zealand Constitution Act 1846*

The Governor under the early arrangements could operate as an autocrat and often did.[37] On the other hand, the Governor had the responsibility of compliance with the Treaty in the light of the fluctuating views coming from the Colonial Office in London.[38] The New Zealand Land Company had friends in high places and this led to the enactment of the New Zealand Constitution Act of 1846.[39] This was the first enactment to give New Zealand self-government but it was never fully implemented. It met with vehement opposition by Chief Justice Martin, Bishop Selwyn and, behind closed doors, Governor George Grey. Governor Grey was clever enough to encourage the pamphlet circulated by the opponents of this measure, but not to leave his fingerprints on it. It argued that Earl Grey's instructions involved a "breach of the National Faith of Britain" and a violation of established law. It expressed a protest against the general doctrine put forward by Earl Grey as the principle upon which colonisation should henceforth be conducted by Britain.

The pamphlet was entitled *England and the New Zealanders* and was privately printed at the Bishop of Auckland's College Press in 1847. It was sent to key people privately and not published.

The first argument recited the UK Parliamentary history from 1834. This included the recognition of New Zealand as "a Sovereign and Independent State" and the circumstances of the Treaty of Waitangi.[40]

The instructions to Hobson were:[41]

> All dealings with the Aborigines for their lands must be conducted on the same principles of sincerity, justice, and good faith, as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands.

Hobson had been sent to New Zealand as her Majesty's Consul not as Lieutenant Governor, and only became Governor after the treaty.

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37 See J Rutherford *Sir George Grey 1812-1898: A Study in Colonial Government* (Cassell, London, 1961).

38 See, for example, Paul Moon *Fitzroy – Governor in Crisis 1843-5* (David Ling Publishing Ltd, Auckland, 2000), and Rusden, above n 29, Vols I and II; Rutherford, above n 37.

39 Rutherford, above n 37, Chapter 12 at 142 et seq.

40 Ibid., at 3.

41 Ibid.

The New Zealand Company's attempt to disparage the treaty as "a praiseworthy device for amusing or pacifying savages for the moment"[42] was dismissed by Lord Stanley.[43] Mr Hope writing to the Company on 1 February 1843 said:[44]

> Lord Stanley is not prepared, as Her Majesty's Secretary of State, to join with the Company in setting aside the treaty of Waitangi, *after obtaining the advantages guaranteed by it*, even though it might be made with naked savages, or though it might be treated by lawyers as a praiseworthy device for amusing or pacifying savages for the moment. Lord Stanley entertains a different view of the obligations contracted by the Crown of England; and his final answer must be that, as long as he has the honour of serving the Crown, he will not admit that any person or any government, acting in the name of Her Majesty, can contract a legal, moral or honorary obligation to *despoil others of their lawful or equitable rights.*

Lord Stanley writing to Lieutenant Governor Grey, on 13 June 1845, said:[45]

> I repudiate with the utmost possible earnestness the doctrine maintained by some that the Treaties which we have entered into with these people are to be considered as a mere blind to amuse and deceive ignorant savages. In the name of the Queen I utterly deny, that any Treaty entered into and ratified by her Majesty's Command, was or could have been made in a spirit thus disingenuous, or for a purpose thus unworthy. You will honourably and scrupulously fulfil the conditions of the Treaty of Waitangi.

The pamphlet concludes:

> The title then of Great Britain to this Country rests entirely upon a voluntary cession of the Sovereignty of the country to the Queen. Therefore, according to established principles of law, all private rights of property existing in the country at the time of the cession remain unaffected. By that cession, Great Britain has not acquired any land of any sort in the country, if that land have an owner among natives, according to their own customs. Whether the land be actually occupied by its owner is not the question; but only, *whether it have an owner.*

It then argues that the second article of the Treaty gave an express guarantee.

The second argument was that Earl Grey's instructions involved a violation of established law. This argued that even without the Treaty there were rights under the common law. This argument cites American precedents and Chancellor Kent.[46] It then further argued a constitutional right as a British

42 Ibid., at 9.
43 Ibid., at 9-10.
44 Ibid., at 9.
45 *England and the New Zealanders*, at 13.
46 Ibid., at 19 et seq.

subject not to have property taken away even by a Legislature in which he is represented, without compensation.[47] The remainder of the argument was against the particular recommendations.

The third argument was a protest against the general doctrine relied on by Earl Grey. This doctrine was based on Dr Thomas Arnold and was demonstrated to be fallacious.[48]

The rest of the pamphlet discusses practical considerations concerning Māori and contains a letter from Mr Maunsell of the Church Missionary Society to Governor Grey.[49]

Both Martin and Selwyn were strongly criticised by some UK politicians for taking this step and it must be admitted it was a questionable action for the Chief Justice.[50] However it was accepted that Chief Justice Martin had acted in good faith. Governor Grey's criticism of Martin was rather hypocritical.

2. *The New Zealand Constitution Act 1852*

Grey never brought the 1846 constitution into force. A new constitution was adopted in 1852 with the New Zealand Constitution Act 1852 of the Imperial Parliament.[51] This remained in force until 1986 when it was repealed by the Constitution Act 1986.

This established the provinces. It provided for

> (1) a bicameral Parliament consisting of the General Assembly, a Legislative Council and the Governor
>
> (2) an executive council nominally appointed by the Governor
>
> (3) six provinces which had authority to enact provincial legislation subject to a reserve power of veto in the Governor. The provinces were abolished in 1876.

Parliament had power to pass laws to the "peace, order and good government of New Zealand" provided they were not inconsistent with the laws of England. The Crown had power to disallow New Zealand legislation. This power was

47 Ibid., at 27 et seq.
48 Ibid., at 35 et seq.
49 Ibid., at 74-80.
50 See Guy Lennard *Sir William Martin* (Whitcombe and Tombs Ltd, Christchurch, 1961) Chapter VII "Good Citizenship or Indiscretion?"
51 Rutherford, above n 37, Chapter 17.

eventually limited by the Balfour Declaration of 1924 that it would only be exercised on the advice of New Zealand ministers, and finally dropped from the Constitution Act in 1986.

Section 71 provided for Māori districts where Māori Law and custom could be applied. It was, however, never implemented by the Crown but was used by Kīngitanga to justify claims for self-government later.

### D. *The Reception of English Law*

The English Laws Act 1858 of the New Zealand Parliament section 1 provided:

> The laws of England as existing on the 14th day of February 1840 shall, so far as applicable to the circumstances of the Colony of New Zealand, be deemed and taken to have been in force therein on and after that day.

This was already the case when New Zealand came under the jurisdiction of New South Wales.

As we have seen, Chief Justice Martin drafted a pamphlet *Ko Nga Tikanga a te Pakeha* in 1845 to explain the basics of English Law to Māori. Later a more elaborate document was produced by Francis Fenton, *Laws of England – Ture o Ingarani*[52] in 1858.

The approach at this time was basically assimilist in spite of Section 71 of the 1852 Act. It is important at this point to refer to the map in William Swainson's *New Zealand and its Colonisation*[53] which shows the limits of British Settlement at 1859. It seems incredible that a European Parliament and legal system was imposed on a predominantly Māori New Zealand. Māori consequently had legitimate concerns which led eventually to the Kīngitanga movement and then warfare.

For many years English Law did not apply beyond British settlements. Tikanga Māori continued to apply, although it gradually absorbed some Pākehā ideas.[54]

Swainson also discusses the development of resident Magistrates and the rūnanga system.[55]

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52 *The Laws of England Compiled and Translated into the Maori Language by Direction of His Excellency Col. J. Gore-Browne, Governor of New Zealand* (Auckland, 1858).

53 William Swainson *New Zealand and its Colonization* (Smith, Elder & Co, London, 1859).

54 The hybrid criminal justice system which prevailed for some time is discussed by Dr Robert Joseph in *'The Government of Themselves': Case Law, Policy and Section 71 of the New Zealand Constitution Act 1852* (Te Mātāhauariki Institute Monograph 2002), at 21 et seq.

55 Ibid n 53, also William Swainson, *New Zealand and the War* (Smith, Elder and Company, London, 1862) p 27-44.

There were limited attempts to implement Section 71 of the 1852 Act in the Native Offenders Act 1856, the Native Districts Regulations Act 1858 and the Native Circuit Courts Act 1858. A proposal by Henry Sewell to establish a Native Council in 1860 was opposed and dropped.

Lord Newcastle, Secretary of State for the Colonies, asked Governor Grey in 1861 whether in some areas the establishment of separate Māori districts would not be the best way of achieving harmony. Grey ignored this suggestion.

In *Wi Parata v Bishop of Wellington* (1877)[56] Prendergast CJ held that Māori custom did not exist. This decision was unsound in principle, contrary to earlier authority and inconsistent with Common Law. It was later rejected by the Privy Council in *Nireaha Tamaki v Baker* (1901).[57] This gave rise to a protest from the New Zealand Bench and Bar which argued the Privy Council's ignorance of local conditions.

In spite of provocations the Māori attitude and that of the first Māori king was to abide by the law until high-handed attitudes by Governors Gore-Browne and Grey led to hostilities after the Taranaki dispute.

1. *The Kīngitanga Movement*[58]

The idea of a Māori king was floated in the early 19th century but never came to anything until the 1850s when the need was felt for the establishment of a symbolic role similar to the English monarch due to the loss of land and loss of mana by the chiefs. The movement was instigated by Tamihana Te Rauparaha, after meeting Queen Victoria in 1851.[59] A leading figure was Wiremu Tamihana (William Thompson as he was known to the English).[60] Tamihana became known as the King Maker. Henry Sewell in the *New Zealand Native Rebellion*, in a letter to Lord Lyttelton in 1864, described it as "a rude attempt on the part of certain native tribes at self-organisation and self-government".

The aim was to provide unity among the Māori iwi, but it was difficult to overcome traditional rivalries. Eventually, Potatau Te Wherowhero, a distinguished but elderly chief of Tainui, was elected King despite his reluctance. He was crowned in 1858.[61]

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56 *Wi Parata v Bishop of Wellington* [1877] 3 NZ Jur (NS) SC 79.

57 *Nireaha Tamaki v Baker* [1901] NZPC C371.

58 See JE Gorst *The Maori King* (KO Arvidson ed, Reed Books, Auckland, 2001, first published by Macmillan & Co, London, 1864).

59 See E Bohan *Climates of War: New Zealand in Conflict 1859-69* (Hazard Press, Christchurch, 2005) at 41. See also K Sinclair *The Origins of the Maori Wars* (New Zealand University Press, Auckland, 1957); J Belich *The New Zealand Wars* (Penguin Books, Auckland, 1986).

60 See E Stokes *Wiremu Tamihana Rangatira* (Huia Publishers, Wellington, 2002).

61 See Rusden, above n 29, Vol 2.

The election of the King and the development of war in Taranaki led to plans by the Government to invade the Waikato.[62] Potatau favoured a peaceful solution but eventually war developed after his death.[63] He was succeeded by his son Tawhiao. After the war and confiscations the King Country remained beyond the pale. Although there was gradual pacification there was a lingering sense of distrust and injustice. The latter to some extent has been dealt with by the Tainui Settlement in 1995 but the former has not been eradicated.

Tawhiao travelled to England to petition Queen Victoria for an independent Māori Parliament and enquiry into the confiscations. His request to meet the Queen was rejected and the UK Government refused to intervene, leaving it to the New Zealand Government.

2. *Arguments against the War*

Sir William Martin, who by this time had resigned as Chief Justice due to ill health, strongly criticised the use of force in his pamphlet *The Taranaki Question*[64] in 1860. He regarded the underlying dispute as one of title, not sovereignty. The opposite view was held by Governor Gore-Browne and the Government. The Government felt obliged to respond to Martin's arguments in *Notes on Sir William Martin's Pamphlet Entitled the Taranaki Question*[65] in the same year. A revised copy was published in January 1861.

Another criticism, arguably of more force, was expressed by James Busby in his *Remarks upon a Pamphlet entitled "The Taranaki Question" by Sir William Martin DCL, late Chief Justice of New Zealand"*[66] published in 1860. These remarks are particularly interesting because Busby had been the British Resident in New Zealand and advised the tribes on the Confederation and Declaration of Independence in 1835. He also had a significant role in drawing up the Treaty of Waitangi. He describes the circumstances of the latter as follows:[67]

> When it became necessary to draw the Treaty Captain Hobson was so unwell as to be unable to leave his ship. He sent the gentleman who was to be appointed Colonial Treasurer and the Chief Clerk to me with some notes, which they had put together as the basis of the Treaty, to ask my advice respecting them.

62 Ibid., at 254.
63 Ibid., at 101.
64 Sir William Martin *The Taranaki Question* (Melanesian Press, Auckland, 1860).
65 Published for the New Zealand Government, January, 1861 [Revised Copy]. For scathing criticism see Rusden, above n 29, Vol 2, at 131 et seq.
66 James Busby, above n 16, at 3-4.
67 Ibid., at 1-2.

> I stated that I should not consider the propositions contained in those notes as calculated to accomplish the object, but offered to prepare the draft of a treaty for Captain Hobson's consideration.
>
> To this they replied that that was precisely what Captain Hobson desired.
>
> The draft of the Treaty prepared by me was adopted by Captain Hobson without any other alteration than a transposition of certain sentences, which did not in any degree affect the sense.

Busby attacks Martin's arguments based on natural rights. Busby argued as follows:[68]

> It is usual for writers on Ethics to treat of what are called "natural rights," meaning thereby the duty and obligation which rests upon every man to treat his neighbour as he would be treated himself, with that sense of justice which is implanted in the breast of every human being by Him who made of one blood all nations on earth, and fashioned their hearts alike: and which, however obliterated by that selfishness and cruelty which reign in the dark places of the earth, requires only to be brought fairly before the mind even of the most ignorant savages in order to command his assent.
>
> The NATURAL RIGHTS are generally considered to be the right to life, liberty, and property; and in this sense Sir W. Martin's rules and observations might be accepted without comment. But this is not the sense in which the words used will be understood by the generality of readers, or by those statesmen whose business it will be to consider the obligations created by the Treaty of Waitangi upon the justice and good faith of the British Government.
>
> In these remarks we have only to do with the rights of property, as they are necessarily understood by jurists and statesmen, implying corresponding obligations to respect such rights. In this sense I do not hesitate to say, that so far as we can trace their history, there is no evidence of the New Zealanders ever having possessed any rights, with the exception of those which were created by the Treaty of Waitangi. Of what use is it, practically, for a man to say I possess a right to my property, when there is no law to define the obligations which are created by such a right, or government with power to administer the law, supposing it to have existed? New Zealand was, in an emphatic sense, a country without a law and without a prince. It is doubtful whether the New Zealander, until he witnessed the exercise of authority under the British Government, possessed any idea corresponding to that which is conveyed to our minds by the word "authority." Their only law was that of the strong arm. "When a strong man armed kept his palace his goods were in peace, but when a stronger than he came upon him, and overcame him, he took from him all his armour and divided his spoils: and there was no redress."

68 Ibid., at 5.

In other words Martin ascribed to the Māori "rights which they never possessed, and claims for them privileges to which they have not a shadow of title".[69]

Another strong critic of the Government was Archdeacon Hadfield who had lived many years amongst Māori.[70] Hadfield later became Archbishop of New Zealand.

A later judicial critic of the high-handed and unlawful behaviour of the colonists and colonial Government was Gillies J[71] in the Supreme Court at New Plymouth on 8 November 1881 where he said that he would be wanting in his duty if he did not allude

> "to the position of the district in which large bodies of armed men were assembled on active service, and he took leave to remind them of the constitutional principle that the employment of an armed force was only justifiable either under the authority of Parliament in repelling armed aggression, or in aid of the civil arm of the law when that arm had proved powerless to enforce the law's mandates. In any other case the use of armed force was illegal, and a menace to, if not an outrage upon the liberties of the people."

## E. *The Transitions in Conceptions of the State*

Before the 19th century Māori had no concept of the state. Crown colony governance was essentially a primitive form of state consisting of a powerful ruler. It was roughly equivalent to the charismatic leader of Max Weber,[72] although governors differed in their charismatic qualities and the whole order rested for its legality on the Treaty and the Common Law.

This coincided with self-rule by Māori in many areas which the Kīngitanga movement echoed to some extent. This was replaced by the colonising state with a built-in Pākehā majority which expropriated Māori land and disregarded Māori rights. Later there emerged the idea of an empowering state with the rise of paternalism and welfare roles which were predicated on assimilation. Around the end of the First World War the process (revolutionary in Brookfield's analysis[73]) of replacing the "Imperial Crown" by the "Crown

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69 Ibid., at 6-7.

70 For a detailed discussion of the evidence of Hadfield and McLean before the House of Representatives see R Fargher *The Best Man Who Ever Served the Crown? A Life of Donald McLean* (Victoria University Press, 2007) Chapter 12, at 212 et seq.

71 See Rusden, above n 29, Vol 3, at 303-304.

72 See Max Rheinstein (ed) *Max Weber on Law in Economy and Sovereignty* (Simon and Schuster, New York, 1954) at xxxii.

73 *Waitangi and Indigenous Rights*, above n 22, at 126.

in right of New Zealand" had been completed, vesting de facto sovereignty in a local body politic, but certainly not that constituted by the Declaration of Independence or that putatively represented by the Māori signatories of the Treaty of Waitangi.

The modern state continues to undergo change.[74] It is not a static concept in spite of the narrow views of some constitutional lawyers. One of the main roles of the modern state is to maintain social order through a monopoly of force.[75] It is the sole taxing authority with power to disburse social benefits and it is the provider or guarantor of public goods. A recent UK publication, *Building on Progress: The Role of the State*,[76] in 2007 identified five roles of the modern state. These are:

(1) the direct provider of services

(2) the commissioner of services

(3) regulator

(4) provider of information

(5) legislator

For a decade or more since 1986 there was a retreat by the state in the move to corporatise and privatise. This came into conflict with rights under the Treaty of Waitangi.

In New Zealand the courts[77] have recognised the peculiar status of the Treaty of Waitangi and identified principles of the Treaty. These principles have subsequently been developed by the Waitangi Tribunal and Parliament and found their way into some legislation. An attempt by Geoffrey Palmer to put them into the Bill of Rights failed.[78]

Another important result of the case law is the recognition of "partnership" obligations on the Crown in respect of the Treaty and in its relations with the Māori.[79] These are either fiduciary or akin to fiduciary obligations.

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74 For an interesting analysis see ibid., passim.

75 See Salmond, above n 4.

76 HM Government, Policy Review, May 2007.

77 See, for example, *New Zealand Maori Council v AG* [1994] 1 NZLR 513.

78 See *A Bill of Rights for New Zealand. A White Paper* (Government Printer, Wellington, 1985). For comment see Joseph, above n 5, at 79.

79 For Treaty jurisprudence, see Joseph, above n 5, at 3. 9. 3. See also 70-73.

It is interesting in this respect to see the invitation to members of the Māori Party to join the Government after the 2008 election.[80] This was not forced on the National Government by MMP but was an act of calculated goodwill.

What this shows is the complex and sometimes troubled development of the New Zealand state and how conceptions of the state change over time and cannot always be adequately explained in legal terms. The reality is that we have evolved as a hybrid community which is now fast becoming multicultural. It is important that we recognise this history and treat each other with respect.

80 See *Relationship and Confidence and Supply Agreement between the National Party and the Māori Party* (16 November 2008).

# Is Custom Conservative? If So, Is It a Strength or Weakness?

Helen Aikman QC

Custom has frequently been characterised as a conservative or even a reactionary force. It is seen as holding back progress and as contrary to human rights, especially for vulnerable minorities. There is an assumption that custom must give way to modernity, and the sooner the better.

A contrary view is that custom represents an essential part of who a people are. While the outward manifestations of custom may change over time, its fundamental tenets remain constant.

The latter view must be correct. Empirical evidence testifies to the resilience of custom, even in the face of the huge challenges of Westernisation and now globalisation.

Custom has always adapted, and the history in the Pacific in the past 200 years shows how adaptive custom has been. The most graphic example was the adoption of Christianity, which has been incorporated into custom to such an extent that it has itself become custom.[1] The early missionaries achieved this feat by appealing to the traditional leaders and often by incorporating analogies to traditional beliefs.[2] Many modern missionaries and human rights advocates could learn much from their example.

Other adaptations followed, with elements of the money economy and education being adopted. As Paul Meredith's research presented to this conference shows, Māori very quickly realised the value of Māori newspapers and journals as a means of communication and cultural maintenance.[3]

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1 New Zealand Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, Wellington, 2006) at 56-57.

2 In many Pacific societies, these "traditional" Christian churches are now being challenged by the new evangelical faiths, which often do not put as much store on traditional obligations to wider family networks or the village as a whole. This creates a whole new challenge to custom and has been the subject of many court challenges based on freedom of religion. See for instance *Teonea v Pule o Kaupule* [2005] TVHC 2 Ward CJ where the High Court of Tuvalu upheld the right of a village council to restrict religions and faith to the three established churches in part because of the emphasis in the constitution on the maintenance of Tuvaluan values and culture.

3 Paul Meredith "Wāhi Tapu: Utilising Te Mātāpunenga" (paper presented at Tūhonohono: State & Custom Symposium, June 2007).

The whare in which this symposium was held, in the heart of Kīngitanga, provides another example. Māori tradition abounds, yet the Kīngitanga was not a traditional Māori movement. Rather it was a very Māori adaptation to the imposition of pakeha Kuinitanga. It has endured for nearly a century and a half, despite the onslaughts of government actions and pakeha culture generally. It continues to thrive today, and is very much a manifestation of Tainui custom.

These adaptations did not mean that custom disappeared but rather that it exists alongside or is incorporated into current day practice, a process that still continues without a change of the core values.

This raises the question – what is custom? Is it the way one's forebears behaved, particularly in pre-European times, or in terms of common law, since "time immemorial" or, as Alex Frame's quote from Pocock suggests, "an ever changing product of historical process"?[4]

I suggest it must be the latter, and therefore custom should not be seen as inherently conservative; it has the capacity to adapt according to the needs of its society. It is not something cast in stone but rather is a normative standard by which a people operate. There may be a normal way of doing things, but when something abnormal occurs, or circumstances change, the custom must be able to mould itself to the new environment.[5]

But, too often, the proponents of custom suggest that custom is immutable; that because something was done a particular way before, it must continue. They seek legitimacy for current action merely by reference to past practice, even if it is not necessarily the "right" thing to do. This is a distortion of custom. Instead one should apply the common law concept of "reasonableness". What was reasonable a century ago is often no longer reasonable today– the law and custom must adapt.

Therefore, while the search for historical antecedents of custom is important to inform as to what and why things were done, it should not lead to current practice being set in stone. The Māori word tikanga clearly illustrates this. It may be translated as "custom", but in fact it is about doing what is "right".

For this reason the Commission recommended against the codification of custom,[6] although this is often the first resort of Western-style law makers: define for us what the custom is so we can apply it like a statute. This risks ossifying custom and it becomes less and less relevant to modern norms and

4 Dr Alex Frame "A Few Simple Points about Custom & our Legal System" this volume.
5 See discussion of custom in Law Commission *Converging Currents*, above n 1, ch 4.
6 Ibid., 190-194.

therefore more readily rejected.[7] On the other hand, a commentary on custom, such as *Te Mātāpunenga*, should be incredibly valuable because it explains the roots and values of a custom, and shows how it has been applied and adapted over time.

One of the characteristics of an oral culture as opposed to a written one is that history (and therefore practice) can more easily change over time. Myths are created that may bear little resemblance to actual events, but which serve a useful purpose for dealing with contemporary events. Depending on who is making the myths and to what end, this may help to ease or aggravate conflict. Either way, it is better if the process of mythologising is acknowledged, so the good myths can be retained and others rejected.

An example of an unhelpful myth in the Pacific is the land tenure laws of some countries. These are often based on the colonial powers' codification of their perceptions of customary tenure. In a number of Pacific societies, chiefs were given the lion's share of the land or associated rentals.[8] What is often overlooked now was the concomitant obligation which chiefs had to care for the welfare of their people and to redistribute wealth.

The motivation for a rigid approach to custom must be examined. In the Pacific, often those who espouse custom most vociferously are those who have most to gain from it – the political elites, as well as some traditional and church leaders. There is a tendency for any challenge to orthodoxy to be rejected as "not the Pacific way". Those calling for recognition of human rights, particularly women and young people, are seen as attacking custom and importing foreign, Western values, when in fact they may simply be seeking a voice.[9]

But just as custom must adapt to modern concepts and demands for human rights, so too must human rights advocates seek recognition of their rights in a way that takes account of custom. Adaptation works both ways. While some rights will be so fundamental that they should not be circumscribed by custom, others can accommodate and recognise it, and will be stronger for such incorporation.

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7 Melody MacKenzie's description of the Hawaiian customary code, set at 1892, is an example of this problem: "Hawaiian Custom in Hawai'i State Law", this volume.

8 On Fiji see Winston Halapua *Tradition, Lotu and Militarism in Fiji* (Fiji Institute of Applied Studies, Lautoka, 2003) 95, citing Pacific Islands Monthly (December 1999) 9; Elizabeth Feizkah "The Money Tree" Time Pacific (20-27 August 2001) <www.time.com>.

9 For instance in *Taione v Kingdom of Tonga* [2004] TOSC 47, the Crown unsuccessfully attempted to restrict media freedom and argued that speech critical of the monarchy was contrary to the cultural traditions of the Kingdom. While criticism of traditional leaders might need to be expressed in terms that take account of cultural sensitivities, custom should not be used as a way of muting political debate.

Much of the concern in the Pacific has been about the emphasis on the universality of human rights, leading to conflict between the "universalists" and the "cultural relativists".[10] While the basic rights may be universal, it does not mean there is only one way of achieving them. It is also often forgotten that human rights have adapted and developed over time as well.[11] In particular, there is increasing emphasis on collective rights and obligations, alongside individual political rights. In particular, the right to practise one's culture is one of those basic rights and is guaranteed by international conventions. And while the scope of rights of indigenous peoples is the subject of ongoing international debate, no one doubts that they must be recognised.

It was the Commission's thesis that, underlying both custom and human rights, as well as most religions, is a recognition of human dignity. Sometimes this value gets obscured in practice, but the aim of decision-makers must be to seek those common values and to ensure that, where the practice of certain customs may have a negative impact, they can be modified. In that way, custom will remain relevant and the formal "law" will be accepted as part of a community's culture, rather than being seen as imposed from outside.

In conclusion, custom is "conservative" if by that one means conserving a culture, but just as cultures adapt, so must custom. That is its strength – and the challenge for the future.

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10 For two perspectives in this debate see P Imrana Jalal "Using Rights-Based Programming Principles to Claim Rights: The Regional Rights Resource Team (RRRT) Project in the Pacific Islands" (2005) <www.rrrt.org>; Konai Helu Thaman "A Pacific Island Perspective of Collective Human Rights" in Nin Tomas (ed) *Collective Human Rights of Pacific Peoples* (International Research Unit for Maori and Indigenous Education, University of Auckland, Auckland, 1998) 1-9.

11 See Sally Engle Merry "Changing Rights, Changing Culture" in Jane K Cowan, Marie-Bénédicte Dembour and Richard A Wilson (eds) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press, Cambridge, 2001) 31.

# "It's in your Bones!": Samoan Custom and Discourses of Certainty

Dr Tamasailau Suaalii-Sauni

## I. Introduction

In thinking about my contribution to this conversation on custom, law and the State, I decided to offer a reflective piece that seeks to deliberately probe the discourses of certainty that both strengthen and undermine assertions of customary knowledge in contemporary Samoan spaces. Let me begin by sharing a brief anecdote.

In September 2011 I invited a young up and coming Samoan-English-New Zealand film director, Marina Alofagia McCartney, from Auckland, to give a public lecture for our Vaaomanu Pasifika Unit's seminar series.[1] I wanted her to talk about her experience engaging with the New Zealand film industry at this early stage in her career and I wanted her to speak about what I can only imagine would have been an absolutely amazing experience participating in the UNESCO supported *Ser un Ser Humano* (To be a Human Being) 2011 film project hosted by the EICTV[2] Film School in Cuba.[3] She was one of only six student film directors chosen from six different continents around the world to produce their own short film that would then be edited and woven together to produce one film to illustrate the textured colourfulness of our indigenous cultures and humanity. For their individual stories each of the six students would use six universal themes – culture, sustenance, faith, hope, fear and love – to make their points.

For her contribution Marina chose to highlight the story of her indigenous Samoan community. She used a New Zealand Palagi film crew and the story was shot in Savaii, Samoa. Among the many intellectual, personal and film-

1 The Unit is part of the School of Social and Cultural Studies, Faculty of Humanities and Social Sciences, Victoria University of Wellington, in New Zealand. I am indebted to Marina for sharing her story with us and for sharing with me some of the details associated with the saying "It's in your bones" that frames this chapter.

2 La Escuela Internacional de Cine y TV de San Antonio de los Baños [International Film and Television School of San Antonio de los Baños].

3 The film premiered at the third festival of Invisible Cinema in Bilbao, Spain in September 2011 and at a UNESCO-hosted premier in Paris in October 2011. For more information on the film see online at: www.eictv.org/en/content/ser-un-ser-humano-2 (accessed 22 September 2011).

specific insights warmly shared at this public lecture was a statement she raised in passing. The statement was made by Marina's maternal Samoan aunt to Marina when Marina questioned her own ability to perform the *taupou*[4] role in an upcoming Samoan *ava* ceremony. As an *afakasi*[5] child, raised outside of Samoa with little to no knowledge of the Samoan language and traditions, Marina was reticent. I sympathise with Marina's reticence given that the *ava* ceremony in question was to be part of the Auckland Samoan community's official rituals of welcome that would precede the live broadcast of then Hon Prime Minister Helen Clark's historic public apology to Samoa made in June 2002.[6]

Impatient with Marina's reticence, her aunt crossly and emphatically retorted (in the way that feisty Samoan aunts do, complete with that strong Samoan accent): "*It's in your bones!*" It was to say: "Why do you fret? You are Samoan. Just do it!"

Marina has never forgotten her aunt's words. Whenever she thinks about what is Samoan or what being Samoan might mean, they ring in her mind. After hearing the story behind the words, they also now ring in mine. I love the feistiness, the certainty and no-nonsense attitude that these words demand. Sometimes we get caught up by our insecurities that we are paralysed to move forward, to try something new. We are often told that we learn from our mistakes. But if we don't take chances we aren't likely to make mistakes. Marina's aunt's words seem to give comfort to the exercise of just trying. But then I got curious about what it is that allows Marina's aunt to say these words and to say them with such certainty. I wondered about the politics of naming and ethnic belonging that her words seemed to be both taunting and assuming . I wondered if she was saying that only those who had Samoan ancestry could consider themselves Samoan and worthy of being a *taupou* in an *ava* ceremony. I also thought about how these words might have impacted on Marina at the moment they were uttered, whether they made her doubly

4 *Taupou* refers traditionally to a village belle. The term refers to a female who has the right to a post (pou) in a meeting with people of rank. She is traditionally the head of the daughters of the village or aualuma group. She represents the aualuma in ceremonial events for the village. She usually sits at the *ava* bowl and is responsible for mixing the *ava* liquid during the *ava* ceremony ready for the *tautu* to serve. See TTTE Tui Atua's paper "*Sufiga o le tuaoi*: negotiating boundaries: from Beethoven to Tupac, the Pope to the Dalai Lama" Keynote Address to the Samoa II Conference, National University of Samoa Le Papaigalagala Campus, Vaivase, Samoa, 5 July 2011.

5 The word *afakasi* is a Samoan transliteration of the English word half-caste, used by Samoans to refer to the children of Samoan and non-Samoan (usually European) parents.

6 See online at: www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=2044857, for copy of her apology speech.

self-conscious and anxious of her perceived inadequacies or not. And, even if they did, whether she would have been able to publicly express this self-consciousness or anxiety. Then I felt troubled.

Marina's aunt's words may well have been uttered because she just genuinely wanted Marina to carry out the role, genuinely believed Marina to be legitimately entitled to do so and genuinely could not see the problem. In fact, in sharing with Marina about this experience it was quite clear that she did what my paternal grandmother would always advise: "take in the good and throw away the bad". But in probing her aunt's words I was reminded of scenarios in my own family whereby my Samoan aunts would tell us "New Zealand-born Samoan kids" how stupid we were in no uncertain terms if we didn't carry the *ie toga* (fine mat) in the "proper" way during ceremonial rituals. The impact of their words is more obviously negative than that of Marina's aunt but the assumptions about knowing or not knowing – that is, the discourses of certainty deployed – are the same. Such utterances are, as Foucauldian theorists have said, not a consequence of an isolated moment but of a governmentality that involves "the serial histories of the practices of the self with those of the practices of government" surfacing and coming together.[7]

I've held onto these words "It's in your bones" and have used them to frame and tone my contribution to this conversation about Samoan custom, law and the State. I invoke them, not because I wish to impose a particular reading of them, but because I wish to challenge us to think more deeply about the discourses of certainty that they and other statements of "the customary" can invoke.

## II. Discourses of Certainty

It is perhaps helpful at this point to offer a brief explanation of my use of the phrase "discourses of certainty". Jon Amundson and colleagues[8] speak of temptations of power and certainty in situations where those given "expert" status assert their knowledge as certain, true and authentic in a way that privileges themselves and their knowledge and silences, disempowers and/or subjugates other or different knowledge or experiences by rendering or

7 See M Foucault in M Dean *Critical and Effective Histories: Foucault's Methods and Historical Sociology* (Routledge, London & New York, 1994) at 208. See also M Dean *Governmentality: Power and Rule in Modern Society* (Sage, London, 1999).

8 J Amundson, K Stewart and V LaNae "Temptations of Power and Certainty" (1993)19 Journal of Marital Therapy 2 at 111.

reproducing them as naïve, unqualified, irrelevant, wrong, or untrue.[9] Foucault has suggested that discourses are structuring principles of society and human behaviour, said and not-said. He states that they are principles that are:[10]

> … secretly based on an "already said" … this "already said" is not merely a phrase that has already been spoken, or a text that has already been written, but a "never said", an incorporeal discourse, a voice as silent as a breath, a writing that is merely hollow of its own mark. It is supposed therefore that everything that is formulated in discourse was already articulated in that semi-silence that precedes it, which continues to run obstinately beneath it, but which it covers and silences. The manifest discourse, therefore, is really no more than the repressive presence of what it does not say; and this "not said" is a hollow that undermines from within all that is said.

The power and pervasiveness of Foucault's use of discourse to describe such structuring principles as custom for example is its probing curiosity of what is said in the not-said and of how when we realise and say what is not-said that in our saying we are forced to admit to the temptations of power and certainty that lurk within. The phrase "It's in your bones" embodies discourses of certainty in that it quells, silences or makes intolerable and un-said (at least out loud) any suggestions of illegitimacy, insecurity, disbelief or uncertainty about one's heritage. While there is a place for certainty in the sense that fairness in resolving disputes requires the clear and transparent application of laws or customs, critical legal,[11] feminist[12] and postcolonial indigenous theorists[13] have been quick to point out that such clarity and transparency depends heavily on the lens through which one interprets the law or the custom. In the realms of the State and the courts, temptations of power and certainty are rife.

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9 Amundson et al. (above) draw on a Foucauldian reading of discourse and his use of subjugated knowledges. On the question of subjugating knowledges Foucault (in G Burchell, C Gordon and P Miller (eds) *The Foucault Effect: Studies in Governmentality with Two Lectures by and an Interview with Michel Foucault*, Harvester Wheatsheal, Hertfordshire, 1991, at 95) states, "it is not a question of imposing law on men, but of disposing things: that is to say, of employing tactics rather than laws, and even of using laws themselves as tactics – to arrange things in such a way that, through a certain number of means, such and such ends may be achieved".

10 M Foucault *The Archaeology of Knowledge* (Translated by AM Sheridan Smith; Routledge, London & New York, 2002) at 27-28.

11 See for example Duncan Kennedy "Political Power and Cultural Subordination: a Case for Affirmative Action in Legal Academia" in *After Identity: A Reader in Law and Culture* (Routledge, New York, 1995).

12 See for example Patricia Williams "The obliging shell: An informal essay on formal equal opportunity" in *After Identity*, above n 11.

13 See for example Moana Jackson "Criminality and the exclusion of Maori" (1990) 20 VUWLR 2 at 23.

I turn now to an examination of what has been said about Samoan custom in two kinds of legal texts: first, the preface of Samoa's Constitution and of the 1990 Village Fono Act; and, second, formal litigant submissions to the Samoa Land and Titles Court. These texts offer some insight into the different ways in which discourses of certainty surrounding Samoan custom are deployed by the Samoan State, by its most powerful judicial body, ie the Land and Titles Court, and by the subjects/consumers of both, ie the litigants. Here I suggest that to assert or invoke Samoan custom one not only has to name and give voice to it, but also to justify or evidence its "truth" to the satisfaction of those who define and preside over it.

## III. Voicing Samoan Custom in Law

The Constitution of the Independent State of Samoa (formerly Western Samoa[14]) is supreme law in Samoa. Its persistence as supreme law since 1962 is evidence of its value to the current Samoan government and by their democratic election to the people of Samoa.[15] In its preface the Constitution specifically states, among other things, that Samoa is an Independent State based on Christian principles and Samoan custom and traditions. Here custom is named alongside tradition:

> WHEREAS sovereignty over the Universe belongs to the Omnipresent God alone, and the authority to be exercised by the people of Western Samoa within the limits prescribed by His commandments is a sacred heritage … the Leaders of Western Samoa have declared that Western Samoa should be an Independent State based on Christian principles and *Samoan custom and tradition.* (Emphasis added.)

Bearing in mind Foucault's point about the un-said and Jacques Derrida's demurring statement about translation, where he says, "I don't know how, or in how many languages, you can translate this [French] word *lécher* when you wish to say that one language licks another, like a flame or a caress",[16] it seemed to me instructive to make visible in this analysis for comparative and interpretive purposes the Samoan language version of this clause of the Constitution. It reads in Samoan:

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14 1960 Constitution of the Independent State of Western Samoa. The name "Western Samoa" was changed to "Samoa" by the 1997 Constitution Amendment Act (No. 2) No.15.

15 I use the term democracy here in the sense employed by Asofou So'o in his examination of what he calls the uneasy alliance between democracy and custom in Samoa. See A So'o (ed) *Changes in the faamatai: O suiga i le faamatai* (National University of Samoa, Apia, 2007).

16 J Derrida, "What is a 'Relevant' Translation" (2001) (Translated by Lawrence Venuti) 27 Critical Inquiry 2 at 175.

> I LE SUAFA PAIA O LE ATUA, LE E ONA LE MALOSI UMA LAVA, LE E ALOFA E FAAVAVAU, ONA o le pule aoao i le Lalolagi e i ai lea i le Atua na o Ia, e afio i mea uma lava ma o le pulega e faaaogaina e tagata o Samoa i totonu o tuaoi na faasinoina mai i Ana Tulafono o se *tofi paia tuufaasolo*; ONA ua faaalia e Taitai o Samoa le tatau ona avea Samoa ma Malo Tutoatasi e faavaeina i luga o talitonuga faa-Kerisiano ma *tu ma aganuu a Samoa.* (Emphasis added.)

The Samoan language terms used in the Samoan version to describe "sacred heritage" and "Samoan custom and tradition" are of particular analytical relevance. The terms in Samoan are named or voiced as "*tofi paia tuufaasolo*" (sacred heritage) and "*tu ma aganuu a Samoa*" (Samoan custom and traditions). "*Tuufaasolo*" on its own is a verb which literally means to pass something on from one to another, implicitly from one generation to another. Unlike the English term "heritage", "*tuufaasolo*" requires a preceding term, such as *tofi paia* (meaning sacred designation) or *mau* (meaning belief or story) to mark what it is that is being inherited or passed on.[17] In this sense the term *tuufaasolo* offers the Samoan reader the idea that something considered custom or heritage is something fluid, it moves, if not in form then in substance, from one generation to the next. *Tu ma aganuu* is the more common Samoan translation for the English idea of customs and traditions: *tu* referring to the image of standing, standing on a firm foundation, implicit in the idea of foundational principles; *aganuu* literally meaning "the ways (*aga*)[18] of a village (*nuu*)". These terms indicate a less fluid, more fixed, understanding of Samoan customs and traditions, and locate the authority for defining, monitoring and enforcing them squarely within the village polity.

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17 Tui Atua in explaining Samoan stories of creation stated that these were "*tala sa fai ma mau tuufaasolo a aiga ma nuu, o se vaega o ata faalemafaufau ma muagagana sa limataitaiina ai le tofa sa'ili ma le faautaga alualu mamao a matua o Samoa i aso ua mavae. O se vaega o le olaga na ola ai tagata, ae le o se mea na ona fatu ma tuumamao ma tagata…*" [family and village stories that were passed on from one generation to the next, provided the metaphors and sayings that guided the search for wisdom and vision of our Samoan forebears. They derived from lived history and personal experience rather than something distant and created by the imagination] (English translation by Tui Atua, personal communication). Tamari Mulitalo-Cheung makes reference to this Samoan passage in her American Samoa Community Samoa course titled "Samoan mythology", SAM204 (Section 01), Fall 2010. She sources the paper titled "*O se suega faalumaga i Tu ma Aga, Tala o le Vavau ma le Tala Faasolopito e faamautuina ai le Filemu ma Pulega Lelei i Aiga, Nuu ma Ekalesia*" by Tui Atua. See website: www.talaolevavauosamoanmythology.yolasite.com. See also Tui Atua's collection of Samoan language writings in his book *Talanoaga na loma ma Ga'opo'a* (Government Printery & Continuing & Community Education Programme, Alafua Campus, University of the South Pacific, Apia, 2008).

18 See B Shore, *Sala' ilua: A Samoan Mystery* (Columbia University Press, New York, 1982) for an interesting discussion on the concept "*aga*".

In Samoa the term *aganuu* is asserted by those who wish to make reference to general custom principles across villages, districts or within the nation. It is differentiated from the term *aga-i-fanua* which refers to customs, conventions or usages unique to a particular village and its people.[19] Tui Atua writes that:[20]

> *aganuu* is a rule or law of general application to Samoa/Samoans. *Agaifanua* [sic] is a rule or law which specifically applies to a family or a village and its origins in history and genealogy. … *Aganuu* allows for a common reference across villages, districts and the nation. *Agaifanua* recognises the uniqueness of each village, its history and genealogy, and so creates *tua'oi* or boundaries within and without.

Cluny and Laavasa Macpherson cite the oft-quoted saying, "*E tofu le nuu ma le aganuu*" and translate this to mean "For each village its own conventions".[21] This underscores the idea that while Samoan customs as general principles derive from the village context, when carried out each village has rules or practices that are idiosyncratic or particular to them. The boundary between

19 The literal translation of the Samoan term *fanua* is land in English.

20 TTTE Tui Atua "Samoan jurisprudence and the Samoan Lands and Titles Court: The Perspective of a Litigant" in T Suaalii-Sauni, I Tuagalu, TN Kirifi-Alai and N Fuamatu (eds) *Su'esu'e Manogi: In Search of Fragrance: Tui Atua Tupua Tamasese Ta'isi and the Samoan Indigenous Reference* (Apia, Samoa, 2009) 52 at159.

21 See C Macpherson and L Macpherson *Samoan Medical Belief and Practice* (Auckland University Press, Auckland, 1990) at 7. This saying highlights a blur or slippage in the use of the term "aganuu". If "aganuu" in this phrase is referring to customs between nations, then technically its usage here makes sense. However, if "aganuu" is referring to the customs of a village then technically the term for the phrase should be "aga-i-fanua".

one village and the next is protected by custom by the principle of *tua'oi*[22] which assumes a concept of rights whereby the rights and authorities of one village will not encroach on those of another. In the modern context as villagers interact more with other villagers and the outside world, the boundaries or *tua'oi* of their custom and traditions or "*aganuu*" (or more technically *aga-i-fanua*) may shift. Such shifts are slow, however.

Use of the word "*nuu*" within "*aganuu*" is interesting in that it privileges the village or *nuu* as the source and model of certainty for what is or is not Samoan culture or custom. Asofou So'o writes that a *nuu* "is an independent political entity comprising a number of *aiga* [families] and their houses and lands".[23] These *aiga* are usually connected genealogically both within the village and to *aiga* in other villages. The identity of the *aiga*, he suggests, is "closely linked to the village", through connections to one or more *matai* (chiefly) titles of the village, which are recorded in village *faalupega* (constitutions). The governing council of the village, or village *fono*, comprise the *matai* of *aiga*, which make decisions on behalf of the village and is the body that adjudicates breaches of customary norms at the village level. As a significant decision-making body in the village the village fono (or *fono a matai ma faipule*) assumes an expert status that is afforded significant power and resources. This status can help towards maintaining social order by making certain one's roles and responsibilities in the village. However, it is also susceptible to the temptations of power/certainty. *Aganuu*, as general rules and norms common to and set

22 Tui Atua offers useful discussion of the concept *tua'oi* in his paper "*E le o se timu na to, o le ua e afua mai Manu'a*: a message of love from *fanauga*" Keynote Address delivered at Professor James Ritchie Memorial Lecture Series, University of Waikato, Hamilton, New Zealand, 23 February 2011. In brief he states that it "refers to those boundaries that arise as a consequence of determining one's rights (*aia*) and authority (*pule*) in relation to those of another. In Samoa the concept *tuaoi* is associated mainly with determining the boundaries between peoples, between peoples and their lands or environment, and between peoples and their Gods. Historically, these boundaries or *tuaoi* were recorded and outlined in *faalupega*, ie village and/or district constitutions, most of which cite the honorifics of the village or district, implying their origins and political structure. [W]hile *tuaoi* may be informed by the broader principles of *aganuu* …the body of laws and customs most relevant to determining *tuaoi* at the village level are known as *aga-i-fanua.* … The presumption is that *tuaoi* is best defined, evaluated and monitored by those who have to live directly with them for ultimately any issues over the rights and authorities associated with an inheritance are issues for those who, as heirs, have a direct and legitimate claim. … *Aga-i-fanua* principles are rules and customs designed to address the specific on-the-ground needs and desires of the village and/or district. These principles evolve over time, taking into account new contexts and imperatives but always recognising that those who are 'of the land' are most intimately tied to the land and to its care and therefore best placed to determine its current and future boundaries. Implicit in both *aganuu* and *aga-i-fanua* are the notions of *tofi* and *faasinomaga* [one's core identity and inheritance as a Samoan]" (ibid, at 6-7).

23 See So'o, above n 15, at.17.

down by villages, is strengthened or weakened depending on how well the *nuu* as a collective, and as the political, social and cultural model, can allay these temptations.

Evidence of the Samoan State's deference to village governance is the passing of the 1990 Village Fono Act, which is still law. Key words within the preface to the Act are as follows: "AN ACT to validate and empower the exercise of power and authority by Village Fono in accordance with the custom and usage of their villages."[24] There are Samoan customs and traditions that exist beyond or outside the village polity. Families for example may have their own customs and traditions separate to, although usually not in competition with, those of the village. Questioning the decision-making authority of the village *fono* can destabilise the *nuu*, risking village chaos. But certainty in this case does not, however, necessarily translate into transparency.

Family customs or traditions, practices and beliefs that fall into conflict with a village *fono* decree can be marginalised and silenced through an inflexible or legalistic enforcement of village custom. In 1993, three years after the Village Fono Act became law, the Samoan family conventions of Nuutai Fatiala Mafulu challenged the Samoan village custom of the village *fono* of Lona, Fagaloa, in Upolu, and his challenge was met with death. When Nuutai, a Samoan entrepreneur, returned to his village Lona to live after living in New Zealand for many years, he refused to live according to what his village *fono* declared to be their *tu ma aganuu.* He was shot dead in front of his wife and children for his defiance.[25] By suggesting, among other things, that he had every right to live in the village because it was "in his bones" but was not bound to village custom, Nuutai's voice posed an untenable threat. In the minds of the chiefs or *matai* who decided on behalf of the village *fono* to silence Nuutai's voice, such a voice couldn't be covered over; it had to be literally silenced forever.

This year (2011) the Samoan government decided to review the 1990 Village Fono Act. As part of this review the reform committee held consultations with key persons from across the country. Because of time and resource constraints the committee understandably restricted participation numbers, which meant having to assert attendance criteria. According to Va'a F Aga of Vaimauga, the criteria imposed by the committee excluded him from voicing his concerns at the consultations. He did not meet the criterion of being a *pulenuu* (village mayor) and was not one of the three chosen by his *pulenuu* to attend. In Va'a's determination to have his say he took the trouble of voicing his opinions in Samoa's national newspaper *The Samoan Observer*, which reaches not only

24 See preface of the Act.

25 See U Aiavao "Death in the Village" (Nov. 1993) Islands Business Pacific 20.

Samoans in Samoa but any Samoan who can access the internet outside of Samoa. In his commentary Va'a highlights two kinds of *nuu* or village. He points out that the reform committee must take notice of the difference between *nuu mavae* (traditional villages), which he defines as those that have *faalupega aloaia* (traditional village constitutions) and *nuu fou* (new villages) that have no traditional village constitutions and where most of the residents live in residences on freehold rather than customary land. In asserting the existence of these two kinds of *nuu*, he points out that the traditional concept of *nuu* shifts to accommodate new contexts, a shift that demands a change in the way we might conceive of *nuu* today and by implication of *aganuu*. But while Va'a perhaps inadvertently unsettled dominant constructions of *nuu* by publicly noting the existence of an alternative construct, the purpose for his opinion was not to endorse the new construct but to realign it with the old. *Nuu fou* he points out are fraught with "lawlessness" and requires a governing body that can control this, something which the reform committee should consider in terms of perhaps extending the scope of the powers and authorities of the courts to impose a *fono a matai ma faipule* (literally the council of chiefs and village mayor, which is also the village *fono*) of sorts, similar to that in *nuu mavae*, in these *nuu fou*. He states:[26]

> It is very well for the Alii and Faipule of an established village (nuu mavae) to do a ruling on a family/individual on customary land, that would stand. But for a family/individual on his/her freehold land, it is hard. For a group of *matai* to call themselves o Alii ma Faipule o se nuu fou [sic] …, it would be hard to evict an unruly family from their freehold [land]. … To add, if not already, a provision for the courts to support/endorse the Alii & Faipule order of eviction on an unruly family/individual after a couple of warnings and not for the courts to rule against the Alii and Faipule decision in a petition against the A&F over rule order. This will strengthen the Alii & Faipule control on their respective villages and over the lawlessness of their residents.

The chiefly system that Va'a alludes to is known as the *faamatai* and is central to Samoan custom.[27] The *faamatai* is today protected and increasingly governed by the Samoa Land and Titles Court. The Court has become the contemporary bastion of Samoan custom and traditions. Within the *faamatai* are three elements considered by Aiono Fanaafi to be core to one's *faasinomaga* (one's core identity and inheritance as a Samoan): first, *matai* titles (*suafa*);

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26 *Samoan Observer*, online at www.samoaobserver.ws/index.php?option=com_content&view=article&id=35555:village-fono-act&catid=52:letters-to-the-editor&Itemid=61 (last accessed 23 October 2011).

27 While a lot of authors have made reference to the *faamatai*, two books have focused specifically on it. See So'o (above n 15) and S Vaai *Samoa Faamatai and the Rule of Law* (National University of Samoa, 1999).

second, lands (*fanua*) that belong to or are governed by the *suafa*;[28] and, third, the Samoan language (*le gagana Samoa*).[29] There is little dispute over the significance of these elements to the *faamatai* and perhaps even to *aga-i-fanua/aganuu* (village custom) or *faasamoa* (Samoan culture). However, connecting the idea of being Samoan to chiefly titles, land and language sets off red lights for those like Marina who feel it in their bones that they are Samoan even if they can't say it in Samoan, have never lived in Samoa and hold no chiefly title.[30]

In probing further the contested meanings associated with Samoan custom, unpacking the relationship between language, lands and titles via what litigants say (and do not say) about *suli* (rightful heir) and *pule* is useful. I turn now to examine how two litigants have voiced their respective claims of *suli* and/or *pule* over lands and titles in the Samoa Land and Titles Court.

## IV. Voicing Samoan Custom in Land and Titles Court Submissions

There are many Samoan customary principles recognised by the Samoa Land and Titles Court in determining Samoan custom.[31] I only wish to focus here on two: *suli* and *pule*. According to Fanaafi Aiono-Le Tagaloa (Aiono Fanaafi's daughter) they are the two most litigated Samoan custom issues in the Land and Titles Court since its beginnings.[32] The two concepts are intertwined. *Pule* is described by Fanaafi as relating to "ownership" and "authority". In relation

28 The question of whether a title belongs to or is governed by land (ie its customs) or vice versa is interesting. Certainly, lands and titles according to Samoan custom or *aganuu* are inextricably linked. Aiono Fanaafi suggests that lands (*fanua*) belong to/are governed by the titles (*suafa*). According to Tui Atua (above, n 20) indigenous Samoan cosmology infers divinity in both land and people. Titles bestow leadership status and are given to people who have an ancestral connection to the families who originally settled on the lands associated with the title and/or who have demonstrated faithful and loving service to this/these same family/families. Land and titles are believed sacred. Perhaps the answer is that both belong or govern each other.

29 Aiono Fanaafi calls this first cornerstone (*le poutu toa muamua*) *igoamatai* (*matai* or chiefly titles); the second (*le poutu lona lua*) she refers to as lands designated to the authority of the *matai* title ("*o eleele ma fanua e pulea e le igoa matai, le igoa po o le suafa, ae le o le tagata o lo o umia le igoamatai*"); and the third (*le poutu lona tolu*) is the Samoan language (*le gagana Samoa*) (*O le Faasinomaga: Le Tagata ma lona Faasinomaga*. Lamepa Press, Alufa, 1997) at 2-4.

30 See Roine Lealaiauloto's (1995) brief article for the *Mental Health News*, where she laments: "I am Samoan, but can Samoans accept me?"

31 See Fanaafi Aiono-Le Tagaloa "'Sua le Lea – toto le Ata': The Land and Titles Court of Samoa 1903–2008: Amid Continuity and Change" PhD Thesis, Faculty of Law, University of Otago, Dunedin, 2009 and Vaai (above n 27).

32 Ibid.

to customary land, she argues that *pule* is "the authority to allocate land, to dispose of it, to exclude people from it, to use, and to allow or end use of it".[33] And she recognises that ownership is more in line with the concept of having trusteeship than an alienable right. *Pule* is therefore about ownership and authority exercised in trust and vested in the *matai* title or office.[34] Those who are bestowed *matai* titles are those whose claims to the title are considered legitimate. These people argue a *suli* status with *pule* rights and obligations. In this sense *suli* is central to the *faamatai* and inextricably linked to the *pule* of a *matai*.

When a *suli* has been bestowed a chiefly title and is formally recognised as a *matai*, the whole machinery of rules and norms associated with his or her *pule* as titleholder is put into play. As with any jurisprudential system there is a struggle between the technocrats who get obsessed with the technicalities of rules and legalese, the philosophers who seek to remind of the proper place of ideals and virtues and then the pragmatists who want workable systems that can progress the business of the day in as efficient and efficacious a way as possible. All three voices can be found in the submissions of Samoan litigants to the Land and Titles Court, both through what they say and what they don't say. What I am interested in here is not to evidence the existence of *pule* and *suli* as customary principles for this is well-documented elsewhere[35] and is rather obvious, instead I seek to highlight how litigants say (or do not say) with certainty what *pule* or *suli* are and the techniques or tactics used, as Foucault would say,[36] to hear some voices over others.[37]

In the interests of space I explore only two narrative excerpts, one each from two different case examples. One case highlights an example of how *suli* has been argued and the other offers an example of how *pule* has been asserted.

The first case involves a family chiefly title "Leulusoo" to which my paternal grandmother is connected. The text of the Court submission I offer was drafted by my father. It basically asserts that a current titleholder is not *suli*. The submission was drafted by my father on behalf of his side of the Sa Leulusoo family of Saleaumua, in Upolu, finalised on 20 December 2003 and submitted

33 Ibid, at 177.

34 See Tui Atua (above n 20) and Vaai (above n 27).

35 See F Aiono-Le Tagaloa thesis (above n 31), A So'o *Democracy and Custom in Samoa: An Uneasy Alliance* (ISP Publications, University of the South Pacific, Suva, 2008) and Vaai (above n 27).

36 See Foucault in Burchell et al., above n 9.

37 Alison Jones "The Limits of Cross-Cultural Dialogue: Pedagogy, Desire and Absolution in the Classroom" (1999) 49 Educational Theory 3 299 at 307 in relation to cross-cultural educational dialogue makes the point that the "voice heard" is more important than the "speaking voice". This is just as applicable in the courtroom.

to the Court just before Christmas. In this submission my father and his co-litigants were appealing against the decision of the Court delivered a couple of months earlier (October 2003) where it upheld the bestowal of the Leulusoo title on one particular incumbent. In making their appeal they raised the issue of *suli*. In offering reasons for their appeal my father and his co-litigants set up their plea as follows. I offer the most pertinent parts for our purposes in Samoan and English.[38]

1. *Lau Afioga ma lo'u faaaloalo tele o le faaiuga matua'i le talafeagai lea, ua faia faamalosi e aunoa ma le malilie iai o suli moni o lenei suafa, lea ua tauaaoina mai e Alii o le Faamasinoga e uiga i lenei Suafa*. [Your Honour, the decision of the Court is untenable, it does not have the support of *suli moni* or the true heirs of the title].

2. *O le pepa numera 4 po o le itulau 4 (fa) o le faaiuga o loo faapea mai le numera 2 puipui. O nofo taluai nei a Paipa ma Faaiviivi e tupuga mai ia Foliano ma ua oo nei i le taimi o Aula'i, e sese mamao i Siamani aua fo'i o le nofo a Paipa e le o se nofo a suli o Foliano. O le nofo o suli o Pu'e lea e itu faatasi ma Aula'i aua foi o le tautinoga manino a Aula'i, o Pu'e o le uso o Aula'i. O gafa a le itu a Tago Osooso o loo molimau mai ai Teofilo Luamanu ma Anetelea Luamanu o latou o suli moni o Pu'e le uso o Aula'i. O tautinoga a le itu tetee numera lua lea e ta'ita'i ai Tago Osooso, o latou o suli o Pu'e. …O lona uiga o le faaiuga LK 286 aso 14/5/1914 e toatele tuaa o loo soifua mai pea, e oo mai i le taimi nei, o nisi e lei lava ona maliliu atu sa silasila ma silafia uma le nofo a Leulusoo Manaia o le atalii o Pu'e*. [The decision at page 4(2) says that the last two titleholders were from Paipa and Faaiviivi heirs, and now it is the time for the heirs of Foliano. The bestowal on the heir of Pu'e is from the same side as Aula'i, because as testified to by Aula'i, Pu'e is the brother of Aula'i. The genealogy of Tago Osooso that Teofilo Luamanu and Anetelea Luamanu testified to, stating that they are true heirs of Pu'e, points out that Pu'e is the heir of Aula'i. The testimony of the respondents for party number two, led by Tago Osooso, states that they are heirs of Pu'e. Therefore as noted in the Court decision LK 286, 14/5/1914, there are many who have passed on and are still alive today who have testified and know that Leulusoo Manaia is the son of Pu'e].

3. *E faamaonia lea itu i tusi e lua a Tafua Faausuusu na ave ia Kovana Kaisalika aso 30 Me 1914 ma le isi i le aso 11 Iuni 1914, e talosagaina ai le Kovana ina ia tofia aloaia Manaia o le atalii o Pu'e e suafa i le Leulusoo…* […Leuluso'o Manaia is the son of Pu'e according to letters sent to the Governor on 30 May 1914 and 11 June 1914 by Tafua Faausuusu, high chief of Saleaumua]….

38 Personal records. The English language translation offered to the court has been refined for economy of space. Most of the English language used in the English original is kept.

As readers of Samoan and English will note, the movement between the Samoan original and English translation is not very smooth and really does only lick the surface, but it is possible from what is said in both the English and Samoan versions to appreciate the point that significant space is given in Land and Titles Court submissions to asserting (both explicitly and implicitly) the rightness of the *gafa* or genealogy of those claiming *suli* status. In this excerpt the litigants use the term *suli moni*[39] to emphasise that heirs must be, in their view, *true* heirs. And, true heirs are those who can show connection to a common ancestor. For litigants such as my father and his cousins the strength of their *gafa* lies in presenting as much corroborating evidence as possible. Two certified copies of two handwritten letters written by Tafua, a recognised high chief title of Saleaumua, to the German Governor Schultz asserting that Manaia is the son of Pu'e, are gold. In putting together their submission, litigants like my father and uncles seek to compose their response by maximising the strengths of their evidence and marginalising any issues that may raise doubt. These are standard tactics for addressing/manoeuvring judicial focus/concern.

Arguing the issue of *suli* in court is thus in large part about arguing the authenticity of one's genealogical record or *gafa* and using one's wherewithal to craft a *mau* or *tala* (ie story/appeal submission) that can support that. Without a credible *gafa* (one that has corroborating evidence), the chances of sustaining a claim of *suli* in the Land and Titles Court is severely limited. In many ways the situation is like that of making scientific claims, whereby claims (hypotheses) are put forward and promoted as "true" (insofar as the evidence permits) until proven otherwise. This case offers an example of how knowledge of *gafa* is power. The power of that *gafa* and the knowledge associated with it is undermined, however, as soon as any of the corroborating evidence asserted to prove the truth or authenticity of the *gafa* is challenged and that challenge upheld by the Court. This begs the question: how does the Court assess the authenticity of a *gafa* and its corroborating evidence? After reading Fanaafi Aiono-Le Tagaloa's doctoral research, where she analyses 460 Land and Titles Court case decisions from 1903 to 2008, the answer is perhaps that, at present, it's hard to tell.[40]

My final point with regards to this analysis of the issue of *suli* is the principle of *felafolafoa'i* (or taking turns) alluded to by the Court in this *Leulusoo* case. It is generally accepted that the principle was and is practised by families as a

39 Sometimes the terms *suli moni* are used interchangeably with the terms *suli faavae* or original (*faavae*) heirs.

40 Fanaafi says: "…due to the nature of the reasoning usually employed in the Court's decisions, it is often hard to know how and why the Court determines how custom should be applied to the facts to resolve a particular dispute" (above n 27 at 199).

fair approach to resolving multiple claims to *matai* titles, especially titles of high rank.[41] In responding to this my father and his co-litigants told the Court that this principle was not appropriate in this case. The Court, they believed, was misinformed as to the incumbent's genealogy; he was not from the lineage that should now have its rightful turn, therefore the Court's finding in favour of the incumbent was more than inappropriate; it was wrong. The basis of this assertion is of course the truth of their version of the Leulusoo *gafa*. In the courtroom (both in their oral and written submissions) litigants perceive that they must present a case or argument that is in no doubt about the rightness of their version (even if only on the balance of probabilities).

The tenor of the excerpt from my father's formal appeal submission contrasts markedly with that of the excerpt to be examined next from a typewritten letter recording content from two conversations. This letter was written by Tui Atua to the Court registrar and submitted to the Court as supporting evidence for two cases that went to Court questioning his *pule* in 2003 and 2010. [42] One conversation was between Tui Atua, Poloai Kaleopa and Poloai Mikaele's representative Tafafuna'i Viliamu; the other between Tui Atua and Tupolesava. Poloai Kaleopa and Tafafuna'i were present during the conversation between Tui Atua and Tupolesava. Tui Atua, Poloai and Tupolesava are key characters in the 2003 and 2010 cases mentioned earlier.

As a *papa* title Tui Atua is of significant historical and cultural value, both to the district of Atua and to Samoa as a whole. Asofou So'o writes that: "The original holders of these [*papa*] titles are traced to the god Tagaloa-a-lagi. From oral traditions, these titles appear to be among the oldest in Samoa."[43] The excerpt from the letter for examination here relates to the *pule* of the Tui Atua over the lands/residence called *Mulinuu ma Sepolataemo* (M&S), situated in the village of Lufilufi, in Upolu. Let me turn now to the specifics of the letter.

On 23 August 1989, Tui Atua Tupua Tamasese Efi as the current Tui Atua titleholder submitted to the Land and Titles Court registrar for filing in the Court records a letter which recorded and summarised the two conversations noted already. Both conversations were directly related to each other and fundamentally about the issue of the *pule* of the Tui Atua over *Mulinuu ma Sepolataemo*.[44] The letter, in the absence of a verbatim transcript, was offered not only as evidence of the fact of an event, ie that the conversation happened at such and such a time involving so and so, but also of Tui Atua's contention

41 See So'o (above n 35).

42 See Samoa Land and Titles Court cases (2003) LC 10481 P1 and (2010) LC 11443.

43 Ibid at 2. Tagaloa-a-lagi is believed in Samoan mythology to be the progenitor of human life in Samoa.

44 I am grateful to Tui Atua for access to this letter and for offering me explanation of the events surrounding these conversations.

that although issues of *pule* are always high drama because of its potential impact on people's livelihoods, those exercising *pule*, especially paramount titleholders, have a real responsibility not only to be certain and transparent about the basis of their *pule*, but also mindful of the message of the saying "*e le tu se tamaaiga i se uaniu*" (literally, a *tamaaiga* or highly ranked chief does not stand alone on the top of a coconut tree), a saying to which I will refer again later. Let me turn now to relevant excerpts from the letter, which are as follows (English translations mine):

> *Ina ua vaivai le gasegase o Muagututi'a Vili, ona savalia lea o a'u e Poloai Kaleopa ma Tafafuna'i Viliamu e fai ma sui o Poloai Mikaele, e momoli mai se mana'o o le toeaina o Muagututi'a Vili ia te au*. [When Muagututi'a Vili was on his death bed, Poloai Kaleopa and Tafafuna'i Viliamu (who came on behalf of Poloai Mikaele) came to see me to pass on the dying wish of Muagututi'a Vili (who wished to be buried at M&S).]
>
> *O la'u fesili muamua ia Poloai ma Tafafuna'i, e faaupuina faapea: O le mataupu lea o lo ua lua oo mai ai e fia tanu le tino o le toeaina i le eleele o Mulinuu ma Sepolataemo, e faigofie, faigata – fuafua i le tali o le fesili lenei. "O se logo po o se faanoi?"* [My first question to Poloai and Tafafuna'i was worded like so: the matter that you have brought with you today, that Muagututia wishes to be buried at M&S, can be straightforward or difficult depending on your answer to my question, which is: have you come to let me know or are you asking me for permission?]
>
> *Tali Poloai: O le talosaga e faanoi ai lou finagalo, ona o le pule atoatoa o loo ia te oe*. [Poloai responded: We have come to ask your permission, we acknowledge that full authority is vested with you.]
>
> *Ona ou faapea atu lea: Ua faigofie le mataupu. Ae le mafai ona avatua so lua tali vagana ua ma feutaga'i ma Tupolesava. Ma, o le a alu le tama e 'a'ami Tupo.*[45] [I replied: Okay, in that case the issue is straightforward. But I cannot give you an answer until I speak with Tupolesava. I will send someone to fetch him.]
>
> *Ma taunuu Tupo ona ou faaalia lea i ai o le mataupu: "E ui lava ona o le pule o loo ia te a'u tusa ai ma le iuga o le Faamasinoga, ae le mafai ona ou soona fai se mea, e faigata lo ta va nonofo. I le o lea, e le mafai ona ou ave se tali ia Lufilufi ae ta te le'i feutaga'i". Saunoa mai Tupo, "e le loto e tanu le tino o Muagututi'a Vili i le eleele o Mulinuu ma Sepolataemo". Ona ou fai atu lea: "Tupo, ia tuutuu mamao lau tofa. Faatoa tula'i mai a lea o se mea faapenei talu mai le nofoaiga a oe ma a'u. Ma, e faamasinoina ai ta'ua e Lufilufi ma le atunuu, po o se tofa alofa, se tofa faamagalo, po o se tofa fai aiga lelei e tausi ai Mulinuu ma Sepolataemo. Ua afu le soifua o Muagututi'a Vili i Mulinuu ma Sepolataemo. Afai e ave lona tino maliu e tanu i se isi eleele e fuatia oe*

45 Tupo is a shortened version of the name Tupolesava.

> *ma a'u". Na i'u ina tuu'aulafo Tupo*. [When Tupo arrived, we discussed the matter. I said to him: "Even though I have the *pule* or authority over M&S as affirmed by the courts, I cannot just assert it without first conversing with you. Because of this I have said to Lufilufi that I will give them an answer only after we have talked. Tupo replied that he did not want Muagututia Vili to be buried at M&S. I paused then said: "Tupo, we have to think carefully and be mindful of doing what is wise and best for the long term. This is the first time that something like this has been brought to us. What we do here will be scrutinised by Lufilufi and Samoa. It will be asked whether what we did was reflective of the wisdom of love, the wisdom of forgiveness and the wisdom of protecting and nurturing what is best for M&S. This man has given long service to the family and to M&S. If we were to deny him a burial on the land he has served faithfully all his life, would that be a loving thing to do? Would we be unduly harsh?" After some thought, Tupo changed his mind.]
>
> *Na ou faaalia: "Afai o le a le lagi o le toeaina, ia faasalalau i le suafa o Tupolesava ma Poloai ma Poloai." Na faapea ona faia."* [I then said that when Muagututia passes away, the funeral notice should be publicised under the directives of Tupolesava, Poloai and Poloai. This is what happened].

The above excerpt identifies that two ranked *matai* titles of Lufilufi – Poloai and Tupolesava – affirmed that the Tui Atua had *pule* over *Mulinuu ma Sepolataemo*. This is evident not only by what was said out loud: "…*O le talosaga e faanoi ai lou finagalo, ona o le pule atoatoa o loo ia te oe*. […We have come to ask your permission, *we acknowledge that full authority is vested with you*]" (my emphasis), but also by the not-said, at least in the above summary record submitted to the Court. What was not said was the "already-said" fact known to Poloai and Tupolesava that no member of Muagututia Vili's family has been buried at *Mulinuu ma Sepolataemo* and this was according to the wishes of key predecessors. How they were to proceed on deciding whether or not to follow the custom set down by these predecessors would depend on how *pule* was to now be negotiated between Tui Atua, Poloai and Tupolesava. After establishing the views of the two Poloai on the Tui Atua's *pule*, the summary record then states that the Tui Atua in discussion with Tupolesava explored what ought to be the right thing to do from their side of things. In consulting with Tupolesava the Tui Atua is saying (without saying it) that although in custom and in law as the Tui Atua he has the *pule* to decide the matter, there is due process within this *pule* which advises of the need to consult with key family members before making a decision. In this situation Tupolesava was one such family member. This due process principle was designed to facilitate rather than hinder good family and village relations. In a paper delivered to the Mātāhauariki Institute's Symposium on Polynesian Customary Law held in Auckland in 2005, titled "Resident, Residence and Residency in Samoan custom", Tui Atua makes this point and makes it in

relation to his *pule* as titleholder over *Mulinuu ma Sepolataemo*. In a bold move the Tui Atua exposes himself in this paper by also asserting the difficulties of enforcing *pule* when one does not and has not lived in the residence or on the lands over which *pule* is claimed. He states:[46]

> There is a common saying in Samoan: *e le tu se Tamaaiga i se uaniu*, literally meaning a Tamaaiga stands or falls because of the bonds of love and loyalty he is able to generate amongst his people, his *aiga*. If he is resident the requisite bonding obviously emerges more easily than if he is not. This is a powerful caveat to the *pule* of Tamaaiga and brings to the fore, in contemporary Samoan times, the significance of the customary and historical reference points of creation (or residency), genealogy (or resident) and place (or residence).

The issue of absentee titleholders is part of the un-said in the conversations between Tui Atua, Poloai and Tupolesava. It is understandable that it would not want to be said in a transcript to the Court. For our purposes here it does raise an interesting question, however, about whether or not *pule* ought to contain a requirement of a titleholder being in residence during his or her residency. In asking Tupolesava to consider the long and faithful service of Muagututia Vili to *Mulinuu ma Sepolataemo*, one could surmise that Tui Atua was probably mindful of the injustice of refusing such a request given both the long and faithful service of Muagututia Vili to *Mulinuu ma Sepolataemo* on the one hand, and his own long-term absenteeism from the same on the other. In relation to the concept of *pule* and how it applies in this case the Tui Atua says (without expressly saying it) that *pule* – and by implication custom – is governed by considerations of justice that must take into fair account the context of the day as well as the virtues of legal or customary principles such as precedent. The character of *pule* painted by this case is of a principle that demands power and certainty, the negative aspects of which can only be tempered by the vigilant embrace of discourses of empowerment and self-reflexivity.[47]

Inexplicable decisions, whether made by the courts or by *matai*, generate an uncertainty that can undermine the bigger project of justice. Explicable decisions that encourage clear and transparent rules and practices are more likely to evoke faith in the fairness of the decision and the decision-maker. This is a strength of discourses of certainty. But there are some decisions or claims that assert a certainty where such certainty actually does not exist. In

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46 See Tui Atua "Resident, Residence and Residency in Samoan Custom" in R Benton (ed) *Conversing with the Ancestors: Concepts and Institutions in Polynesian Customary Law* (Te Mātāhauariki Institute, University of Waikato, 2006) at 76.

47 R Keesing "Creating the Past: Custom and Identity in the Contemporary Pacific" (1989) 1 *Contemporary Pacific* 1&2 19 talks about the need for astute scepticism and self-reflexivity in order to overcome the temptations of certainty that bedevil scholarship on custom.

these cases, which would include some but certainly not all claims of *pule* and *suli* status, the discourses of certainty at play can operate more to confound or subjugate than to empower. It is these situations that must be watched for carefully and where the technologies of justice must be sophisticated enough to pick up on and to then appropriately deal with. But doubt or uncertainty are not always negative, in fact they can be empowering and productive; they can be, as my friend Sister Vitolia says, exuberantly life-affirming.[48] In this sense our inquiries into custom are exercises in the sensitive but rigorous scrutiny of certainty, engaged in for the greater and relentless goal of searching for justice. In our probing we would be wise to remember, that such a search involves not only a search for the wisdom of what was said, but also of what was not said, and of the wisdom of not saying what perhaps ought to be said.

## V. Conclusion

One of the huge difficulties associated with probing the said and unsaid in court cases, especially those involving public figures, in small places like Samoa where only a handful of titles hold significant pull at the national level, is that sometimes what is brought to light is politically uncomfortable. For any leader the easy option is to suspend critical judgment or maintain silence on any matter that even just smells politically contentious. Samoan custom as a human construct can never be totally immune to human manipulations. The subtleties of meaning and the problems of translation mean that sometimes we can only really touch the surface of understanding the myriad ways in which Samoan custom is voiced, not-voiced, heard and mis-heard, understood and mis-understood. But that is not to say that we cannot or should not try to delve beneath the surfaces to get at what might be true or real, to get at what connects or disconnects, or to what drives things such as custom and holds us to it. Custom may well be an invention that is reinvented and even circumvented, for good and bad, as Roger Keesing has pointed out, but unpacking it is, at least in the Samoan context, as *aganuu* or *aga-i-fanua*, our closest connection towards working out, as honestly and as openly as possible, what and why we say and believe something to be, as Marina's Aunt puts it, just "in your bones"!

Soifua.

48 See V Mo'a "Le Aso ma le Taeao – the Day and the Hour: Life or demise of "Whispers and Vanities?", in T Suaalii-Sauni et al (eds) *Whispers and Vanities: Negotiating indigenous and religious cultures in the Pacific* (publisher to be confirmed,forthcoming).

# Gender and Custom in the South Pacific

Dr Claire Slatter

## I. Introduction

I am a feminist of mixed ancestry (Chinese, English/Irish, Fijian, Samoan, African), and I have a background in national, regional and global activism in the anti-nuclear/peace/independence, labour and women's movements, and in the movement for democracy, constitutionalism and human rights in Fiji. I am no expert on matters of custom. My academic training was in political science and I taught political studies for 17 years at the University of the South Pacific.

I was invited to contribute to the symposium because I produced a paper on gender, custom and human rights for the New Zealand Law Commission's project on Custom and Human Rights in the Pacific,[1] based on a reading of recent literature. One of the aims of this symposium, Tūhonohono: Custom and the State, is to join with Pacific scholars to advance the understanding of custom law and its contribution to state legal systems, and to learn from Pacific experience in the use of customary institutions and processes for the resolution of disputes. I hope some of what I have to say will be useful.

A primary goal of the New Zealand Law Commission's custom and human rights project was to try to find ways of narrowing the present divide between custom and human rights, by identifying their common values. This starting point interested me because I read the project as being about finding or identifying the common humanist values in Pacific custom and human rights. I like to think that there are universal values in humanity and that they lie at the core of all cultures. In our present troubled times marked, on the one hand, by the so-called "war on terror" and the multitude of sins including resource plundering perpetrated in the name of that cause, and on the other, by the homogenising effects of neoliberalism, not least in asserting market values to the exclusion of all else, I believe we would be well served to identify and affirm the universal, humanist values in all cultures, and to have them inform our laws, policies and practice, in the interests of advancing our common humanity, while defending our different ways of living.

1 See New Zealand Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17; Wellington, 2006).

I want to say from the outset that I hold a somewhat critical perspective on custom, and this has been informed by both witnessing and reading about how custom plays out in Pacific states, where it is alive and well, governing many aspects of people's daily lives, and often strongly contested. There are many things in Pacific Island custom and culture that are precious and that I have elsewhere written in strong defence of – not least, the core values that lie at the heart of our cultures. Pacific Island states have also largely retained systems of customary land ownership through which a majority of Pacific Island people have been able to pursue subsistence or semi-subsistence livelihoods – they may not quite be living in "subsistence affluence" but they have effectively been shielded from dispossession, poverty and want. Pressure to change customary ownership systems, or at least to free up land for more productive investment and give security of tenure to investors, could drastically change present realities – in some places they already have, to economic and social detriment. I am a strong defender of customary systems of land tenure, and of the option of subsistence and semi-subsistence livelihoods, although I am also a critic of both the disproportionate allocation of rent monies to customary leaders and the parastatal organisation set up to administer lands in Fiji and the deliberate mobilisation of landowners by that institution to deny land lease renewals to Indo-Fijians. The case illustrates how a custom-based institution can be manipulated for narrow political ends, with inhumane and unjust consequences.

In this paper, which largely draws on that produced for the Law Commission, I discuss gender and custom in the Pacific, specifically the value and standing accorded women under regimes of custom, from the broader perspective of advancing universal humanist values. As I see it, Pacific Island societies ascribe value to a range of meaningful "intangibles" – relationships, a sense of community, social responsibility for the wider group, respectful behaviour, sharing and reciprocity, leisure or investment of time in strengthening social relationships, including through celebration and practices of redistributing wealth. Not all of these values are necessarily practised today but they exist as ideals and, what is more, are congruent with evolving more equitable gender relations, giving women equal voice and standing, opportunities and rights.

## II. Some Preliminary Comments on Sources, Frames of Analysis and Interpretations of Custom

Social scientists tend to analyse societies from either of two broad theoretical perspectives. The functionalist perspective sees all parts of a society – its social structures, beliefs and values, rules and practices – as essentially concerned with holding society together and maintaining stability and equilibrium. All

elements function to serve the interests of the whole. The conflict model, on the other hand, looks at a society in terms of who holds power and how, with a focus on mechanisms of domination and control. The underlying idea is that society consists of competing groups in constant conflict because wealth and power are unequally distributed. In the competition for power a dominant group emerges and comes to control a disproportionate share of wealth and social status. This group exercises control over all other aspects of the social structure to ensure that society functions to serve its interests.

Both analytical frameworks informed early anthropological and other scholarly work in the Pacific and each read gender systems differently, or not at all. For instance, the conflict perspective would link the monopolisation of power and social status by male elders in an agricultural society dependent on women's labour with mechanisms of control over women's productive and reproductive capacities, and the beliefs and values that provide ideological support for them. Functionalists would rationalise the gender division of labour and women's exclusion from certain arenas in society in terms of biological differences and security considerations. More recently, post-modernist and post-structuralist approaches to studying Pacific cultures have produced new interpretations or revisions of some of what was earlier "known".

The primary or original source of information on custom in Pacific Island societies is oral traditions. Most Pacific Island communities underwent such significant transformation following contact with Europeans that it is difficult today to discern what we might call "traditions", in the sense of long-established values and practices, from what are variously subscribed to, practised or cited as "custom" today. For one thing, much oral history was

lost in the major demographic crises that followed European contact,[2] which were so severe they left many communities unable to reproduce themselves. Moreover, custom beliefs and practices were often so denigrated by Christian missions in some communities that they were abandoned in part or in whole, as "heathenism" or "the work of the devil".[3] Where custom survived it was often in a significantly modified form. Thus, much of what passes for custom today is an amalgam of old and new ideas, values and practices, demonstrating that custom is neither immutable nor static, but rather adaptive and dynamic. It also needs to be acknowledged that oral traditions are continually interpreted, reflecting changing realities and power relations in society. Embedded within these customary forms are the interests of stakeholders and this is of particular significance when considering gender and custom.

Most of the literature addressing the intersection of gender and custom in Pacific societies is ethnographic or anthropological. The published works of anthropologists are often the only accessible sources of documented knowledge on customs and culture as they were practised and lived in times past, and are actively drawn on by Pacific Island people in some contexts to define or authenticate custom.[4] Missionary and other early accounts are continuously mined by contemporary scholars seeking to interpret or reinterpret the past. Summarising what is now known about the traditional

2 Bronwyn Douglas "Christian Citizens: Women and Negotiations of Modernity in Vanuatu" (2002) 14(1) The Contemporary Pacific 1 at 7 refers to the devastating depopulation in Aneityum "obliterat[ing] much indigenous practice and disrupt[ing] the transmission of *kastom* knowledge". Aneityum's population in 1830 was estimated to be between 4,600 and 5,800. By 1941 it had fallen to 186 (B Douglas "Traditional Individuals? Gendered Negotiations of Identity, Christianity and Citizenship in Vanuatu", 1998, *State, Society and Governance in Melanesia Discussion Paper* 98/6, Research School of Pacific and Asian Studies, Australian National University, Canberra, at 9). D Denoon ("Land, Labour and Independent Development" in D Denoon, ed, *The Cambridge History of the Pacific Islanders*, Cambridge University Press, Melbourne, 1997 at 244) writes that "colonial administrators were not fantasising when they feared extinction. He records the 70 per cent decrease in the Chamorro population of the Marianas in the late 17th century, the estimated 90 per cent reduction in the Australian Aboriginal population by the 1930s, the "demographic collapse" of the Hawaiian population, the decimation of many islands in Solomon Islands, the New Hebrides (which lost in total about half its population, with Aneityum driven close to extinction) during the years of "resource raiding and the labour trade", similar decimation of the Kanak population, the halving of almost all Polynesian populations, and the risk of "near extinction" suffered by Micronesian societies.

3 Douglas, above n 2 at 7.

4 Joan Clayton Larcom ("The invention of convention", 1982, 13(4) Mankind 330) records that the Mewun in Malekula, Vanuatu, by 1982 had come to accept "anthropological knowledge as arbiter of their authentic past", and that the work of anthropologists was increasingly employed in post-colonial Vanuatu to define *kastom* as tradition, and to support land claims and court cases.

gender division of labour in Pacific Island societies, Linnekin[5] commented that the descriptions were "only as sound as the sources on which they are based" and that male Western bias in early ethnohistorical accounts meant women and their activities were often ignored. Hence, the significance of women's manufacture of valuables for ceremonial exchange in Polynesian cultures was poorly appreciated, or ignored, by missionaries, administrators and male anthropologists alike until Weiner undertook work in the Trobriand Islands.[6] Similar inattention was paid to women's "unique and important roles in their own politics and ceremonies" in Melanesia.[7] New analyses of bride wealth practices in Melanesia have validly challenged earlier interpretations as well as the very term "bride price", conferred by outsiders, for misrepresenting the forms and meanings of reciprocal exchanges associated with marriage as they were traditionally practised, and for contributing thereby to distorting both its contemporary practice and the meaning ascribed to it, to the detriment of women.[8]

Women's scholarship has contributed significantly to contemporary understandings of gender and custom, recording and analysing aspects of culture which were previously unknown because no one had "asked the right questions".[9] Apart from the extensive work undertaken by women anthropologists, the corpus of theoretical and empirical knowledge on custom and gender has been enriched by the scholarship of women lawyers associated with the University of the South Pacific Law School, two of whom (Jennifer Corrin Care and Miranda Forsyth) participated in the Tūhonohono symposium, and by the work of gender and development specialists.

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5 Jocelyn Linnekin "Gender Division of Labour" in Donald Denoon (ed) *The Cambridge History of the Pacific Islanders* (Cambridge University Press, Melbourne, 1997) 105.

6 Annette Weiner *Women of Value, Men of Renown* (University of Texas Press, Austin, 1983).

7 Jean Zorn "Women, Custom and International Law in the Pacific" Occasional Paper No 5, City University of New York, n.d. at 12. (The paper was first presented on 29 September 1999 to the Faculty of the University of the South Pacific School of Law, Vanuatu).

8 Interview with Lissant Bolton. Bob Makin "Lissant Bolton on women in trade in Vanuatu" (27 Nov 2005) *The Independent.*

9 Citing the work of Gilbert Herdt ("Sexual Reproduction, Social Control, and Gender Hierarchy in Sambia Culture" in BD Miller, ed, *Sex and Gender Hierarchy*, Cambridge University Press, Cambridge, 1993, at 193), Zorn (above n 7) points out that until "the right questions were asked" – after "several generations" of ethnography in Papua New Guinea – anthropology had also missed recording ritualised homosexuality in the highlands as a "vital part of the relations between older and younger men in Melanesia".

## III. Gender and Custom – What is Known about What was, and What has Changed

From Jocelyn Linnekin's summary of what is known about the traditional gender division of labour in Pacific Island societies it is evident that men and women supplied different products, were spatially allocated different work areas (interior/coast, swampy/dry land, reef/ocean), grew different crops, and amassed and contributed different goods in ceremonial exchanges.[10] She suggests that complementarity "in economics, cultural symbolism and ritual status" may be the "one feature common to the gender division of labour in Pacific societies".[11] In the supposedly more "egalitarian" Melanesian cultures,[12] social ordering by gender appears to have been central to complex social relations of trade and exchange,[13] male dominance "more explicit and more extreme", and the gender order underpinned by ritual prohibitions associated with ideas about female powers and pollution.[14] In Polynesian societies, where status has been ascribed by birth and social organisation determined as much by rank as by gender and age, Polynesian women "were the equals of men in genealogical status and social rank" and often wielded "formidable personal and political authority as kinswomen and chieftainesses".[15] The matrilineal societies of Island Melanesia exhibited some distinctive differences, notably in respect to inheritance of land, which passed through women to men, and the gender division of labour in agriculture, which appeared more flexible. Micronesian societies defied generalisation, presenting a diverse range of organisational forms, "from stratified chiefdoms to localised extended-family organisations", and traditions of ceremonial exchange involved both men and women.[16]

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10 Linnekin, above n 5 at 105-113.

11 Ibid, at 112.

12 In contrast to Polynesian societies, based on inherited chiefly leadership, Melanesian societies have long been labelled "egalitarian", on the basis that any male, supposedly, can achieve "Big Man" status. When considered from a gender perspective, however, the label is inappropriate.

13 In most of the New Guinea Highlands, women produce goods for men's ceremonial exchange and men exercise control over the products of women's labour (Linnekin, above n 5, at 107-108).

14 Ibid, at 105. Polynesian cultures also associated women in some way with taboos and sacred spiritual power. Meredith Filihia ("Men are from Maama, Women are from Pulotu: Female Status in Tongan Society", 2001, 110(4) JPS 377 at 386), for instance, locates the origins of women's privileged status in Tongan cosmogonic myth, specifically the myth that women originated from Pulotu, the Tongan afterworld and source of chiefly things and power, making them *eiki* (superior in rank) to men. Tongan women hold higher rank as sisters, being *eiki* to their brothers, but as wives they are "subject to the authority of their husbands", and the mother's side of the family is *tu'a* (inferior) to the father's side.

15 Linnekin, above n 5 at 105.

16 Ibid, at 106.

Christian missionaries in Melanesia have been "stigmatised" as the "destroyers of culture",[17] but Christianity has been so thoroughly embraced throughout the Pacific that today it is most often equated or conflated with culture. This has been a double-edged sword for women. On the one hand, Christian ideas and values such as the equality of all in the sight of God, and respect for all humankind, have provided a strong foundation for women's human rights claims. On the other hand, biblical texts that teach that wives should "submit to [their] husbands as to the Lord" (Ephesians 5:22-23) not only helped create a new asymmetry in gender relations based on male domination/female submission, they are regularly cited by conservative males to justify gender inequality as divinely ordained.[18]

The "civilising" mission of Christianity had profoundly transforming effects on gender relations. Aside from their very positive impacts, including stamping out brutal practices such as widow-strangling and various forms of mutilation, and bringing literacy and education to women, the teachings of Christian missions had the general effect of domesticating women. Cooking, domestic cleaning, child care and responsibility for family/household well-being were made women's exclusive remit as the missions remade women as primarily wives and mothers. Many of the missions trained women to work as domestics in European households.

In Polynesia, the influence of Christian missions resulted in elevating women's status as wives, correspondingly diminishing their customary higher standing as sisters.[19] In matrilineal cultures in Melanesia, women lost powers that they had had in their ancestral culture.[20] Through its imposition of the norms of monogamous marriage and the "patriarchal family", its valorisation of "legitimacy", and its teachings on sexual morality, Christianity is said to

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17 Ann Chowning *An Introduction to the Peoples and Cultures of Melanesia* (2nd ed, Cummings Publishing Company, Sydney, 1977) at 85.

18 Roslyn Tor and Anthea Toka *Gender Kastom and Domestic Violence Report: Research on the Historical Trend, Extent and Impact of Domestic Violence in Vanuatu* (with support from the Vanuatu Government and CUSO, Port Vila, Vanuatu, 2004).

19 Penelope Schoeffel "The Origins and Development of Women's Associations in Western Samoa 1830-1977" (1977) III Journal of Pacific Studies 1. 'Atu 'o Hakautapu Emberson-Bain *Women in Tonga* (Country Briefing Paper, Asian Development Bank, Office of Pacific Operations & Social Development Division of the Office of Environment and Social Development, Manila, 1998). By contrast, Filihia (above n 14 at 386) attributes women's loss of standing as wives to mythology – by being brought from Pulotu to Maama (this world) by Maui to be the wives of Kohai, Koau and Momo (the first three men "who sprang from the worm and were the first Tu'i Tonga rulers"), the women "demonstrated a submissiveness to their husbands", although they still pass on their rank to their children.

20 Margaret Jolly citing the view of Grace Mera Molisa: M Jolly "Beyond the Horizon? Nationalism, Feminisms, and Globalisation in the Pacific" (2005) 52(1) Ethnohistory 137 at 158.

have brought to an end the sexual freedom previously enjoyed by unmarried, separated and widowed women of the non-chiefly class in Polynesian cultures.[21] Christian norms in regard to gender, sexuality and reproduction deprived women of much of their earlier freedom and autonomy in relation to these matters.

In other ways, Christianity negatively affected women's status. The introduction of surnames (the name of a father or husband) and "Christian" names, for instance, is said to have deprived ni-Vanuatu women of the multiple identities and names they earlier attained through cultural grading ceremonies that gave them "traditional rights to rank, authority and autonomy".[22] By forcing men and their wives and children to live together in Melanesia, missionaries not only changed customary residential arrangements under which men occupied "men's houses" and lived separately from their wives and children.[23] They may also have inadvertently created the conditions under which domestic violence was able to flourish, giving rise to the impression that it was "customary" for men to beat their wives.[24]

On the positive side, Christianity is credited with according women recognition as *ariki* (chiefs) and as landowners in the Cook Islands.[25] This had a further beneficial effect especially for women in Rarotonga when, following annexation of the Cook Islands by New Zealand, a Land Court was established to regulate land tenure, and practices which were not typical in custom such as female inheritance and matrilineal inheritance were accepted as a norm, laying the basis for equal inheritance rights.[26] Women in Rarotonga subsequently played a major role in the Land Court's development and interpretation of what is custom, by undertaking "methodical research" into kinship connections and "attend[ing] Land Court sessions to assert and defend their land interests".[27]

More recent analyses of women's experience with early Christian missions in Aneityum suggest that ni-Vanuatu women were not passive receivers of "The Word" but "creative appropriators of Christianity", exercising agency by seeking out what the missions had to offer and attending schools and services

21 Emberson-Bain, above n 19, at 66.
22 Tor and Toka, above n 18, at 37.
23 Zorn, above n 7, at 13.
24 Ibid.
25 Commissioned paper on Customary Law in the Cook Islands.
26 Ibid.
27 Imrana P Jalal *Law for Pacific Women: A Legal Rights Handbook* (Fiji Women's Rights Movement, Suva, Fiji, 1998) at 67.

"in the face of violent opposition from their husbands".[28] More recently, some of the churches have produced passionate advocates for women's equality, and their theological writings reflect strong association with the women's movement.[29] Women remain absent from authority positions in most churches today, however, and their continuing confinement to subordinate or auxiliary roles reflects Christianity's gendered legacy.

In contrast to Christianity which is widely venerated in the Pacific and accepted as an intrinsic part of Pacific Island peoples' cultural identity, colonialism is equated with foreign domination and exploitation.[30] Yet, generally speaking, men increased their power and status vis-à-vis women under colonialism. Through both wage labour and cash-cropping, men became income-earners and benefited from new technology, while women were left with the burden of subsistence food production, in addition to domestic and family responsibilities, neither of which were remunerated or held much social esteem. For their own political ends, colonial administrations modified and institutionalised chiefly systems, where they existed, and created them where there were none.[31] The very idea of chiefs in Vanuatu is considered to be a colonial creation, and one which has had significant implications for gender relations since chiefdom was given status as a male preserve.[32]

Among other things, colonialism impacted on gender relations in property. A land registration system introduced by the British in the Gilbert Islands (Kiribati) altered customary landholding by vesting individual title in the most senior male in the kin group (*unimane*), thereby locking in patrilineal inheritance.[33] While the traditional system was apparently not without gender

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28 Bronwyn Douglas (above n 2, at 3) argues that ni-Vanuatu women welcomed instruction in the domestic arts from missionary wives, not least for the "pleasure in sociability with other females beyond the immediate family" and were thus "active participants, for their own reasons, in the missionary project".

29 Keiti Ann Kanongata'a "Pacific Women and Theology" (1995) 13 Pacific Journal of Theology 17.

30 In Fiji, at least among indigenous Fijians, colonialism tends to be viewed more benevolently because of both the Deed of Cession (understood to have been an agreement between Fijian chiefs and Britain), and the "protectionist" policy followed by the colonial government in relation to Fijian land and way of life.

31 According to Forsyth, "chiefs" in Vanuatu were a Presbyterian Church creation, adopted and modified by the Condominium government to "establish individuals throughout the archipelago who could represent and act for their communities in dealings with outsiders" (cited in Commissioned Paper on Vanuatu). Despite being an "introduced phenomenon", Forsyth says, the chiefly structure today has become "so far entrenched in kastom as to have become its very cornerstone" (Miranda Forsyth "Beyond Case Law: *Kastom* and Courts in Vanuatu" 2004 35 VUWLR 427 at 430).

32 Interview with Lissant Bolton, above n 8.

33 Emberson-Bain, above n 19 at 27.

discriminatory features, codification removed the flexibility that once existed in customary land transfer practices, including the practice of gifting land in special circumstances.[34] The system of individual title has reportedly so fragmented holdings that today many are too small even for subsistence production. Boundary disputes are common and land litigation by disinherited sisters or girl cousins frequent.[35] In other places too, land ownership was individualised and patrilineal succession to land institutionalised.[36] The combination of mission and colonial experience in the Cook Islands appears to stand alone for having enabled women to benefit from codification of land customs and a Land Court.[37]

## IV. Discourses on Gender, Custom and Human Rights in the Pacific

Post-independence discourses on gender, custom and human rights in the region have tended to reflect two divergent views – on the one hand, a view of custom as male-determined and as wielded by men in positions of authority to keep women in subordination; on the other hand, a view of custom as authoritative and of women's rights advocates as alienated from their own societies and corrupted by Western thinking and values. An associated argument in the second perspective is that in certain Pacific cultures there is no discrimination against women.

The writings of the late Grace Mera Molisa, a widely respected women's leader and poet, from Vanuatu, best illustrate the first position. Mera Molisa's celebrated poem "Custom" sharply censures those who "inadvertently" misappropriate, misapply, bastardise, murder and conveniently recall "custom" to "intimidate women, the timid, the ignorant, the weak".[38] It is important to note, as Jolly does, that Mera Molisa was not critical of *kastom* per se – as chair of the Vanuatu Cultural Centre board she had been "vigorous in her support of indigenous values and arts" and had reportedly worked closely with the head

34 Ibid, at 46.
35 Ibid.
36 For example, Ponape, as indicated in the Commissioned Paper on the Federated States of Micronesia.
37 Jalal, above n 27, at 67.
38 Grace Mera Molisa "Custom", in *Blackstone* (Mana, Suva, 1983).

of the *Malvatumauri* at the time, Chief Willie Bongmatur of Ambrym.[39] She was, rather, critical of how custom is employed by those with power in the modern state of Vanuatu, against those who are powerless.[40]

The second position, an excusatory or justificatory argument in favour of the status quo, is often verbally expressed in meetings, or via the public media, usually by conservative males opposed to the very idea of women seeking equality with men, or in reaction to a particular action or statement from women.[41] Statements made by some Pacific leaders at the 1991 South Pacific Forum while discussing the Report of a Seminar on the *Convention of the Elimination of All Forms of Discrimination against Women* (CEDAW) held in Rarotonga in May 1991 illustrate this perspective. The leaders alluded to the imposition of Western values, asserted biblical teachings on the position of women, and contended that there was no discrimination against women in their countries.[42]

Conservative viewpoints are also shared by women – Adi Finau Tabakaucoro of Fiji reportedly walked out of the Rarotonga Seminar in protest at the imposition of [foreign] values "by Western participants".[43] Commenting on this conservative perspective in the 1991 Seminar, Mera Molisa suggested that it mostly emanated from women of rank who enjoy higher status by virtue of their rank, while ordinary women in those societies suffered discrimination.[44] Like the argument that democracy is a "foreign flower"[45] the argument that

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39 Jolly, above n 20, at 147.

40 A later collection of Mera Molisa's poems titled *Colonised People* is dedicated to the women of Vanuatu whom Mera Molisa saw as still colonised in independent Vanuatu as they are not free, or independent, or self-determining, and do not enjoy "the fruits of the struggle". The poem's message, "that independence had failed to address the oppressive situation of women" underlined Mera Molisa's role as "community conscience and mouthpiece" (Selina Tusitala Marsh "Ancient Banyans, Flying Foxes and White Ginger: The Poetry of Pacific Island Women" in Alison Jones et al, eds, *Bittersweet : Indigenous Women in the Pacific* University of Otago Press, Dunedin, 2000, 137 at 155). See Jolly (above n 20) for further analysis of Mera Molisa's work.

41 Another example is Government Minister Barak Sope's statement reported by *Vanua'aku Viewpoints* on 21 November 1997 that "according to the custom of his home island … men could not be criticised by women". The statement was made in response to strong criticisms of his activities by Vanuatu's (female) Ombudsman (Bronwyn Douglas, above n 2, at 7).

42 Grace Molisa Mera *Colonised People: Poems* (Blackstone, Port Vila, 1987); Zorn, above n 7, at 6.

43 Zorn, ibid.

44 Jolly, above n 20, at 150.

45 The "foreign flower debate", triggered by a letter to the *Fiji Times* from Adi Finau Tabakaucoro in defence of the first military coup in Fiji on 14 May 1987, is discussed in Stephanie Lawson *Tradition versus Democracy in the South Pacific: Fiji, Tonga and Western Samoa* (Cambridge University Press, Cambridge and New York, 1996).

women's equality is a Western notion is selective in its renunciation of Western influence. Rarely, if ever, is Christianity, for instance, challenged for its Western origins.

The argument that men and women in Pacific Island societies have been "equal but different" and played complementary roles appears to be enjoying a revival, especially among women scholars working on Vanuatu.[46] It is also claimed that complementarity of gender roles in Samoa allows women to assert influence within family decision-making processes, including in the bestowment of titles and the resolution of conflicts.[47] Insofar as they are closely linked to struggles for gender equality such perspectives are strategically valuable, not least in providing a way of engaging with, interrogating, and remaking custom "from the inside". But romanticisation of pre-European Pacific societies poses a significant challenge to critical analysis. Merilyn Tahi, Coordinator of the Vanuatu Women's Centre which works on violence against women, makes a clarifying distinction between women having standing and respect in custom, and women having rights under the constitution.[48] Bolton records that Vanuatu women's organisations had by the 1990s moved away from a commitment to *kastom*, developing a discourse on rights instead.[49]

Pacific women who write or speak out on custom and culture appear to be comfortable with the idea of culture and custom adapting to incorporate and reflect human rights norms. In some respects it appears to be mostly males who express a static or fixed view of custom and resistance to the concept and language of rights (with the exception of indigenous rights, to which conservative Fijian men fully subscribe), and women who mostly agitate for custom, and the thinking of men who interpret and mediate custom, to change.[50] The words of Bougainville women's leader, Helen Hakena, who called on custom leaders in 2005 to bring their thinking and practice into line with the values of both their matrilineal society and human rights norms, is illustrative:[51]

46 Zorn (above n 7); Douglas (above n 2); Bolton in Makin (above n 8).

47 Commissioned paper on Samoa.

48 According to Tahi, "some people say women always had rights in custom, e.g. chiefly women had recognition and were *respected*". But she said she was talking about "*rights* under the constitution. Women are controlled in custom in relation to who they marry, and in respect of their reproductive rights or rights over their children. And men argue that they have the right to control women. So there are no real rights enjoyed by women" (28 Feb 2006; Pers comm).

49 Lissant Bolton *Unfolding the Moon: Enacting Women's Kastom in Vanuatu* (University of Hawaii Press, Honolulu, 2003).

50 See contributions by participants at the first Pacific Women's Conference in Vanessa Griffen *Women Speak Out! A Report of the Pacific Women's Conference. October 27 – November 2, 1975* (1975) New Zealand Electronic Text Centre <www.nzetc.org/tm/scholarly/name-140009.html>.

51 See femLINKpacific: Media Initiatives for Women, bulletin, 9 September 2005.

> The culture here still looks down on women even when it's a matrilineal society. We are still struggling to be heard and accepted or included in decision-making processes. We urge the chiefs and men to attend workshops on human rights or other courses facilitated by churches as well as to familiarise themselves with international conventions like CEDAW which PNG has ratified. Bougainville is still an integral part of PNG, so CEDAW also applies to the ABG [Autonomous Bougainville Government].

Despite several Pacific Island leaders arguing in 1991 that gender equality was "antithetical to customs, traditions and religious beliefs of their countries" or that it already existed,[52] by 2005 all but four Pacific Island Forum states (Kiribati, Nauru, Solomon Islands and Tonga) had become signatories to, or had ratified, CEDAW.[53] Nevertheless, at the level of the community, tensions between custom and women's human rights remain and are given expression from time to time in the pronouncements of chiefs or in the judgments of village or custom courts.

Custom courts have come in for a lot of criticism from women scholars and activists. Jalal has argued that families fare better under the formal legal system than under customary law, largely because custom court decisions are "usually negotiated by [male] village elders and chiefs" who "share and shape community cultural and social beliefs about the place of women in the community".[54] However, she also states that even in a family law case in the formal courts "the woman is … more likely to lose".[55] And, where the formal legal system takes account of customary law, as they are instructed to do by several Pacific Island constitutions, rulings in favour of custom and against the rights and interests of women do often ensue.[56] According to Jalal, because customary laws are usually not written down and expert witnesses

52 Zorn, above n 7.

53 Report on behalf of the Pacific Islands Forum Group to the 50th session of the CSW, 1 March 2006 by HE Mr Robert G Aisi, Permanent Rep of PNG to the UN.

54 Imrana P Jalal "Ethnic and Cultural Issues in Determining Family Disputes in Pacific Island Courts" (paper presented at the 17th LAWASIA Biennial Conference, Triennial New Zealand Law Conference, Christchurch, 4-8 October 2001) at 4. Kenneth Brown and Jennifer Corrin Care ("Putting Asunder: Divorce and Financial Relief in Solomon Islands" 1995 5(1) OUCLJ 85) make the points that dispute resolution fora in the Solomon Islands are "constituted by chiefs who are invariably male", that women "often have no right to speak during the process except through a male representative", and that the Local Courts have been "manned almost exclusively by male justices".

55 Ibid.

56 HA Amankwah ("Human Rights, Customary Law and Traditional Practices in Melanesia: A Legal Paradigm of Peaceful Co-existence or Conflict?", School of Law, James Cook University, n.d.) cites two cases (*O'Sonis v Truk* in FSM in 1988 and *Minister for Provincial Government v Guadalcanal Provincial Assembly in the Solomon Islands High Court* in 1977) where the formal courts ruled against women by finding, respectively, that only males could be the head of the family and only males could be "traditional chiefs".

called to testify to a specific custom of a particular community are "almost never" women, what is usually applied is customary law "as perceived by [male] village elders and chiefs".[57]

In her Epilogue to a collection of papers on restorative justice in the Pacific Islands, Jolly records that "many Pacific women" had "highlighted the deficiencies of *both* the criminal justice system and of village courts … in dealing with those cases which most graphically embody conflicts between men and women – rape and domestic violence". She referred to "disturbing recent evidence from across the region" of the failures of *both* systems to deal with such conflicts "in a way which delivers both peace and justice", citing a study of domestic violence in Port Vila by Merrin Mason, based on cases brought to the Vanuatu Women's Centre, and a paper by Sarah Garap on how village courts handled cases involving wrongs against women in the Simbu Province of Papua New Guinea.[58]

Based on research on cases handled by three village courts in the National Capital District (NCD), Goddard sought to overturn the idea that village courts in Papua New Guinea were treating women less than fairly. He argued that village courts were an important recourse for women "with limited avenues for seeking justice and recompense" and that women were using them to good

57 Ibid.

58 Merrin Mason "Domestic Violence in Vanuata" in S Dinnen and A Ley (eds) *Reflections on Violence in Melanesia* (Hawkins Press/Asia Pacific Press, Annandale, NSW, Australia, 2000); Sarah Garap "Kup Women for Peace: Women Taking Action to Build Peace and Influence Community Decision-Making" *State Society and Governance in Melanesia Discussion Paper* 2004/4 (Research School of Pacific and Asian Studies, Australian National University, Canberra, 2004). Based on Mason's study, Jolly said the justice system and the police in Vanuatu were failing to properly deal with wife battery as a criminal matter, while custom chiefs were likewise stressing "reconciliation and the harmony of the community at the expense of the wronged woman". Jolly cites Garap reporting that village courts were intimidating to women, disciplined women and not men in adultery cases, blamed the victim in sexual violence and rape cases, and compensated the male relatives of rape victims rather than the woman (M Jolly "Epilogue – some thoughts on restorative justice and gender" in S Dinnen, A Jowitt and T Newton Cain, eds, *A Kind of Mending: Restorative Justice in the Pacific Islands*, Pandanus Books, RSPAS, ANU, Canberra, 2003, 265 at 272).

effect.[59] Goddard's monitoring and gender analysis of 271 cases before the three NCD village courts confirm statistically that women use village courts, perhaps more often than men (more cases in his sample were brought by women), and have been "reasonably successful disputants" in village courts. However, while some of the cases in his sample concerned intra-family or marital problems which may or may not have included domestic violence, none of them appeared to relate to sexual abuse or rape, or to concern other offences (e.g. adultery) for which village courts have gained notoriety for discriminatorily penalising or shaming women.[60] His research does not, however, invalidate the analyses of other (mainly women) researchers and activists whose highlighting of "worst practice" cases of gender discrimination put village courts on notice.

Most of the critics of custom courts are not opposed to custom per se, or to the existence of custom courts. Respect for traditions and customary ways of Pacific Island people is expressly stated by several contributors to the debates on gender, custom and human rights. At the same time, the idea of custom as absolute, or eternally fixed and unchanging, is rejected. The promotion of customs and a justice system which encourage mutual respect between men and women is a bottom line. Zorn's suggestion (in respect of wife-beating) that it needs to be asked whether a practice is "so integral to the custom of a society that it has to be retained" is a useful one, and her judgment that where a practice like wife-beating is considered to be part of traditional culture "it may be necessary to criticise tradition in order to change contemporary behaviour", appropriate.[61] In the 21st century, zero tolerance of violence against women must also be a bottom line.

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59 Goddard usefully summarises research and analysis on the subject since 1979, including a 1990 Judges Report on the judicial system in PNG, and newspaper stories on incidents of unfair jailings of women by village courts between 1989 and 1991, for failing to pay fines. He also offers an alternative explanation for the pattern of harsh imprisonment of women by village courts, by drawing attention to both the poor literacy of magistrates and the *Tokpisin* version of the *Village Court Handbook* which includes an unclear note on the optional jail term for non-payment of fines (Michael Goddard "Women in Papua New Guinea's Village Courts" *State, Society and Governance in Melanesia Discussion Paper* 2004/3, Research School of Pacific and Asian Studies, The Australian National University, Canberra, 2004). His argument that the fault lay with village court magistrates' "rigid application of the law" rather than of custom might have been strengthened had he shown evidence of men being similarly subjected to harsh treatment.

60 Twenty-nine of the 50 cases brought against men in one of the courts were for drunkenness, excessive noise and obscene language.

61 Zorn, above n 7, at 293-294.

Jalal's counter-posing of customary law as based on "two apparent principles – the good of the community takes priority over the rights of the individual, and decisions are made through negotiation and consensus"[62] and the formal legal system as one which "emphasises the rights of individuals, makes decisions on the basis of argument and confrontation wherein "the best argument wins", applies the doctrine of precedent, and allows appeal against a judgement to a higher court"[63] is not helpful for the purposes of the present project. The assumptions made about each system also warrant unpacking. The "good of the community" argument raises questions about "who decides", and "by what criteria". Customary processes of negotiation and consensus in reality often prevent "free and frank discussion where the contribution of each participant enjoys equal weight",[64] raising related questions about who are involved in such consultations, and whether decisions are made after thorough consideration of the issues and interests involved. The suggestion that the "best argument" wins in the formal legal system downplays the principles of law on which arguments and judgments rest, as well as the proactive, "law-making" role of the courts, having regard to international conventions, as well as to considerations of justice.

Jalal's example of Cook Island women using Land Courts to their advantage by doing thorough research, attending its sessions, and effectively asserting and defending their land interests may be a case of the best argument winning. But she also counts among the factors that contributed to their success the court's receptiveness, which she considered an "indicator of the wider social change in men's and women's roles that had occurred in the community".[65] This highlights the important role of broader social processes in the creation, acceptance and institutionalisation of new norms. It also perhaps resonates with what Sailau Su'aali'i-Sauni (this volume) has said of ambiguities (or what we might consider flexibilities) in custom.

An innovative project by the Vanuatu Cultural Centre which is encouraging women to provide "new perspectives on their custom"[66] provides an inspirational model for "unfixing" culture and building new social agreements on bottom-line societal values. A bottom-up project which engages the Centre's volunteer women fieldworkers annually in a workshop to discuss various *kastom* research topics, the project entails the recovery or reclamation of *kastom* as well as a conscious effort to insert women into what has until recently been a male-dominated discourse on *kastom*. The project offers a

62 Zorn cited in Jalal, above n 54, at 4.
63 Ibid.
64 Lawson, above n 45, at 166.
65 Jalal, above n 27, at 67.
66 Interview with Lissant Bolton in Makin, above n 8.

unique opportunity for women to rehabilitate *kastom* in a gender-just way. Yet the process is not without tension and struggle. Anthropologist Lissant Bolton, who assists with the workshop each year, explains that separate workshops for women are important "because if you were doing it with men and women there would for certain be a constant tension from certain men about women getting above themselves".[67] The fieldworkers work each year in their own communities promoting new *kastom* ideas and practices and are already having significant impact. Many of them are being recognised for their leadership and given roles as assistants to chiefs, although "some places are more amenable" to allowing space for women's leadership than others.[68]

## V. Some Examples of Tensions Between Gender and Custom

Despite these encouraging changes, many tensions remain and although I do not wish to end on a negative note, I do want to share some examples in order to illustrate some of the very real problems which women have been experiencing with custom.

### A. *Political representation and leadership*

Customary restrictions on women's participation and representation in "traditional" decision-making councils appear to be widespread across the region. Resistance to women's representation in national parliaments is also widespread and custom has often been invoked to deny women political equality, as the following examples indicate.

In Vanuatu's first national elections, a council of chiefs in Northern Efate tried to bar women from standing for election on the grounds that it infringed *kastom*. In 1997, a government minister (who subsequently became Prime Minister) demanded the repeal of the Ombudsman Act, saying it contradicted "traditional practices in Vanuatu" by allowing its female incumbent to criticise male leaders. He said on his island "men could not be criticised by women". More recently Vanuatu's Council of Chiefs, the Malvatumauri, expressed the view that the election of women chiefs in the north of Vanuatu was a "distortion of custom". A former Head of State was also quoted in 2004 saying that according to Vanuatu custom women were not to enter into politics or decision-making bodies. Citing the Bible, he suggested that these places of leadership were divinely ordained only for men.[69]

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67 Ibid.
68 Ibid.
69 *Vanuatu Daily Post* article, 23 April 2004, cited in Tor and Toka, above n 18.

In Papua New Guinea male domination of political parties and bullying of female members of parliament discourage women from seeking electoral office. In recent national elections, male supporters of sitting male members of parliament in at least one province effectively hijacked polling booths, disenfranchising voters and intimidating women voters in particular. Women candidates interviewed for a documentary film on those elections spoke of being threatened with harm to their families if they did not withdraw from the contest.

The Solomon Islands' Provincial Government Act of 1996 was found by both the High Court and an Appeal Court to discriminate against women by reserving 50 per cent of the seats for the appointees of chiefs and elders (since only males can be "traditional chiefs") *but not to be in conflict with the Constitution*, which sanctioned "traditional chiefs" playing a role in government at the provincial level.[70]

In the Marshall Islands, a matrilineal society, a bill tabled in the parliament, the Nitijela, in 2006 proposed to ban women from holding chiefly titles, and their associated rights to land.[71]

### B. *Violence against women*

While violence against women may not be a cultural norm in Pacific Island societies, custom may be blamed for tolerating it.[72] Moreover, sanctions against wife-beating that reportedly existed in the past have mostly been abandoned.

In Samoa, although domestic violence offenders are reportedly punished by the Village Fono, this only tends to happen in cases where the violence is considered extreme. More worrying is the reported practice by Village Fonos of preventing police from interfering in domestic violence cases "unless there [is] a strong complaint from the victim, which village customs strongly discouraged".[73]

In Vanuatu, a draft Family Protection Bill, which has been in the pipeline since 1998, is likely to be supported only if the traditional roles and responsibilities of chiefs in *Kastom Kots* are recognised in the bill and its implementation.[74]

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70 Commissioned paper on Solomon Islands.
71 *Pacific Beat*, 9 February 2006.
72 US Department of State Country Reports on Human Rights Practices 2004 – Samoa.
73 Ibid.
74 Commissioned paper on Vanuatu.

In Tonga, although violence against women is on the increase (450 complaints were recorded in 1996), the issue is shrouded in silence because of shame, and cases involving nobles or others of high social rank escape police investigation and prosecution.[75]

West Papuan women's rights' groups reportedly see custom law as providing little protection for women victims of domestic violence, and customary processes involving compensation payments between families as unsuited to dealing with situations of violence within the family.

In Bougainville, in 2005, custom chiefs imposed a ban on women wearing shorts, supposedly to "help reduce rape and sexual violence", and began fining those who breached the ban $50 or sentencing them to community work. By imposing a dress code and making it a punishable offence for women to wear shorts, the decision not only infringed women's right to freedom of dress, it implicitly excused male sexual offenders by holding women responsible for their criminal actions.

The Committee on Economic, Social and Cultural Rights (CESCR) of the United Nations raised concern in its response to Solomon Islands' 2001 report about women's inferior status and subjection to patriarchy despite the tradition of matrilineality, and the prevalence of gender-based domestic violence which is not always addressed by competent authorities.

### C. *Marriage and divorce*

In custom courts in both Solomon Islands and Vanuatu, adultery is an offence for both men and women, but in practice only women tend to be fined and made to present mats and other valuables to chiefs.[76]

Irrespective of how it was practised and what it meant traditionally, the institution of "bride price" as it has come to be practised in modern times has severely negative consequences for women. The very term "bride price", conferred by outsiders, has encouraged the commodification of women and the exercise of absolute proprietorship by husbands over wives. Escalation in the amount of wealth expected (or demanded) by the bride's family makes it extremely difficult if not impossible for women to escape from a violent marriage. And, as arranged marriages are most often the result of family to family consultations and agreements, the rights of women and girls as

75 Emberson-Bain, above n 19, at 41; although this number had apparently dropped to 113 reported cases in 2000, it had risen to 404 in 2009. The 2000-2009 figures were revealed by the Tongan Police Commander in May 2010 – see http://www.rnzi.com/pages/news.php?op=read&id=53609.

76 Ibid.

individuals are subordinated to the wishes of the group – the bride has "little or no say on the person she marries", and is under enormous pressure to comply with the family's wishes and decision.[77]

The practice of giving a woman as part of compensation payments to settle an inter-tribal dispute involving the death of a tribesman was found by the Papua New Guinea Supreme Court in 1997 to be a "bad custom" and not what the framers of the constitution of modern day Papua New Guinea had in mind in maintaining and promoting good traditional customs.[78]

Over the last 10 years, the Supreme Court in PNG has ruled against a number of Village Court decisions that were found to violate women's rights. The custom of murdering or mutilating an adulteress was ruled contrary to the general principles of humanity by the PNG Supreme Court in 1985; the imprisonment of a woman by a Village Court in 1991 for failing to pay a fine for adultery was found to infringe Section 55 of the Constitution relating to equality and denigrate "the woman's humanness"; customary prohibitions on widows consorting with other men were ruled "discriminatory" and "not in keeping with the dignity of mankind" by the Supreme Court in 1993; and the custom of allowing a man to live with a woman without paying bride price, to assess whether she would make a good housewife and was fertile, was ruled "repugnant to the general principles of humanity" in 1994.[79]

### D. *Inheritance and custody*

Because custody rights are often closely tied to inheritance rights, Tuvalu women are doubly disadvantaged under gender-discriminatory customary land tenure arrangements – being deprived of land rights and consequentially of the right of custody, ironically in what might be claimed as the "best interests of the child".

When men die intestate in Kiribati, gender-discriminatory provisions in the Land Code favour the eldest male, or all males, before the eldest daughter and all other females but the reported frequency with which such decisions

77 Alice Aruheeta Pollard "Bride Price and Christianity" (paper presented at the Women, Christians, Citizens: Being Female in Melanesia Today Workshop, 11-13 November 1998, Australian National University, Canberra <http://rspas.anu.edu.au/papers/melanesia/conference_papers/1998/participants.htm>). Anne Marie Tupuola "Learning Sexuality: Young Samoan Women" in A Jones, P Herda and TM Suaalii (eds) *Bittersweet: Indigenous Women in the Pacific* (University of Otago Press, Dunedin).

78 Injia J in Re Willangal (1997) PNGNC, cited in Commissioned Paper on PNG.

79 Commissioned paper on PNG.

are contested in courts by disinherited sisters and girl cousins suggests that such provisions in the law are neither accepted without question as custom, nor regarded as fair and just.[80]

Tonga's explicitly gender-discriminatory land laws may be amended. A landmark decision of the Privy Council on 11 August 2006 approved a proposal from Tonga's Minister of Lands, Survey, Natural Resources and Environment, to "explore possible avenues for amendments to the country's land laws to allow women, in cases where there is no direct male heir, to inherit registered allotments". The intention of the proposed amendment is to allow a daughter to inherit her father's allotment where there is no brother as direct heir, and to pass on her rights to her first male descendant.[81]

In Melanesian marriages involving so-called bride price, children are considered to belong to the father's side once bride price is paid and even custody cases that come before the formal court tend to take this aspect of customary law into account and award custody to the father.[82]

### E. *Protection under the Law*

In the Federated States of Micronesia (FSM) it was reported that "cultural resistance to litigation and incarceration" had allowed serious cases of sexual and other assault (and even murder) to go untried, and that "suspects were routinely released indefinitely".[83]

In Kiribati, Tonga, Samoa and Fiji, customary practices of seeking and receiving forgiveness for a wrongdoing through symbolic presentations and the offer of a formal apology by the offender's family to the family of the victim are important mechanisms for restoring relationships within small communities. Its use in cases of criminal violation, especially rape and other forms of sexual abuse of women by men, is highly suspect however. It can result in pressure being put on the woman victim to drop criminal charges, or be taken into consideration by the court, resulting in a reduced sentence for the convicted offender, thereby denying the victim full protection under

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80 'Atu Emberson-Bain (*Women in Development – Kiribati*, Country Briefing Paper, Office of Pacific Operations and Social Development Division, Asian Development Bank, Manila, at 28) notes the high proportion of land litigation cases brought by disinherited sisters and girl cousins.

81 See http://lyris.spc.int/read/messages?id=49330 (Accessed 7 November 2011)

82 Jalal, above n 54, at 15.

83 US Department of State Country Report on Human Rights Practices 2005 – Federated States of Micronesia, cited in Commissioned paper on FSM, State Government <www.state.gov/g/drl/rls/hrrpt/2004/41651.htm>.

the law. In a similar way, holding informal community courts and imposing custom punishment can work to the offender's advantage and deprive victims of justice.

In situations of inter-tribal or inter-ethnic violence, customary ceremonies and dispute-resolution processes are particularly inappropriate for addressing crimes of sexual violence perpetrated against women during the conflict. Such ceremonies and processes are often concerned more with purging feelings of hatred and revenge, appeasing the spirits of war and of those killed, and promoting reconciliation through the sacrifice of pigs, participation in a feast, and ritual washing of weapons, than with delivering justice to female victims of rape.[84]

The practice, resorted to in some places, of requiring a rapist to marry his victim, supposedly to confer respectability on both parties and retrospectively "legitimise" the non-consensual sex, provides the worst example of gender injustice under custom law. Concern about one such reported case in Vanuatu was raised by the Convention on the Rights of the Child (CRC) Committee.

In rape trials involving indigenous offenders in Australia, specious arguments have been advanced by defence lawyers, and accepted by magistrates and judges, that rape does not constitute a serious offence under Aboriginal customary law and that a man had the right to enjoy sexual relations with a "promised wife" under the age of 16.[85] Such arguments have been strongly repudiated by Aboriginal women, including lawyers, who have criticised the court's leniency towards male offenders, and asserted that under custom Aboriginal women are treated with respect, crimes of sexual assault are treated with great severity, and that only since the introduction of sexism through colonisation have Aboriginal women come to be treated as inferior.[86]

## VI. Concluding Comments

The ratification of both the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women by a majority of Pacific Island States indicates official recognition of rights of both children and women, and obliges Pacific Island governments which have ratified these conventions to bring their laws and policies into conformity with these conventions. There is a high level of awareness in the Pacific Island states of CEDAW and CRC and nongovernmental organisations

84 Commissioned paper on West Papua.

85 Commissioned paper on Australia.

86 Larissa Behrendt "What Price a Bill of Rights?", Opinion piece *National Indigenous Times* (nd) <www.nit.com.au/opinion/story.aspx?id=6383>.

in several countries have collaborated in compiling shadow reports to submit to the CEDAW Committee. While a rights-based framework might appear to be diametrically opposed to custom, I would argue that it is not necessarily opposed to the core values that lie at the base of custom. The challenge lies in identifying and strategically using these in the ongoing project of building more cohesive, caring societies, based on common values of humanism.

# Hawaiian Custom in Hawai‘i State Law

Melody Kapilialoha MacKenzie

## I. Introduction

Over hundreds of years and in relative isolation, Native Hawaiians developed a complex society and subsistence economy based on their relationship with the gods and the natural world. Prior to Hawai‘i’s first written laws, Hawaiian custom and usage regulated Hawaiian life.[1] Thus, Hawaiian customary practices, particularly those related to land, have been recognised and incorporated into Hawai‘i’s statutory law since the earliest formal written laws in 1839. During the reign of Kamehameha III, the Kingdom of Hawai‘i developed written laws that included protections for ancient custom and usage.[2] These laws survived political transitions and continue to apply as underlying principles of property law in Hawai‘i. Of equal importance is that modern Hawaiians continue traditional practices and usage. As one scholar notes, today there are “customs and practices related to each major aspect of Hawaiian lifestyle and livelihood, including family, community life, human well-being and spirituality, natural environment, cultural and ecological resources, rights, and economics”.[3]

In 1978, the Hawai‘i State Constitution was amended to specifically recognise traditional and customary Hawaiian practices by adopting Article XII, Section 7:[4]

1 John Ricord, Preface to [1846] 1 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 3 (“[1846] 1 King. Haw. Laws”) (stating that “the Hawaiian kingdom was governed until the year 1838, without other system than usage, and with a few trifling exceptions, without legal enactments”), cited in Public Access Shoreline Hawaii v Hawai‘i County Planning Comm’n (“PASH”), 79 Hawai‘i 425, 437 n. 21, 903 P.2d 1246, 1258 n. 21 (1995), cert. denied, 517 U.S. 1163 (1996).

2 See, PASH, 79 Hawai‘i, at 442-47, 903 P.2d at 1263–68 (tracing the development of private property rights in Hawai‘i).

3 Davianna Pōmaika‘i McGregor “An Introduction to the Hoa‘āina and Their Rights” (1996) 30 Haw J of Hist 1 at 3.

4 Haw. Const. art. XII, § 7.

> **Traditional and Customary Rights**
> **Section 7.** The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

In deliberations on this provision, the constitutional framers recognised that Native Hawaiian "sustenance, religious and cultural practices … are an integral part of their culture, tradition and heritage, with such practices forming the basis of Hawaiian identity and value systems",[5] and viewed the amendment as a vehicle to "preserve the small remaining vestiges of a quickly disappearing culture [by providing] a legal means by constitutional amendment to recognize and reaffirm native Hawaiian rights".[6]

In a series of cases beginning in 1982, the Hawai'i Supreme Court has interpreted this section and other statutory provisions to allow access by Native Hawaiian cultural practitioners to undeveloped or less than fully developed lands in order to exercise traditional and customary rights. The Court has also imposed a duty on public agencies to assess and protect to the extent feasible such rights when issuing development permits. Nevertheless, many open questions remain about the reach and extent of the amendment – who can exercise these rights, on what kinds of property, what kind of state regulation is appropriate, and what are the responsibilities of government agencies in regulating development that impacts traditional and customary rights?

This paper explores the historical roots of Hawai'i's recognition of traditional and customary practices related to land and natural resources and the development of custom in modern times through Hawai'i case law. It also presents a brief overview of three other areas of law in which Native Hawaiian customs have been recognised and incorporated into State legislation. The paper concludes with an Oli Aloha or chant expressing the values of Aloha. This oli, which has been adopted into State law, seeks to encourage and infuse state actions with traditional Hawaiian concepts and values.

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5 Comm. of the Whole Debates on Hawaiian Affairs Prop. No. 12 reprinted in 2 Proceedings of the Constitutional Convention of Hawaii of 1978 (1980) at 426.

6 Standing Comm. Rep. No. 57 on Hawaiian Affairs Prop. No. 12 reprinted in 1 Proceedings of the Constitutional Convention of Hawaii of 1978 (1980) at 640.

## II. Historical Background

In Hawai‘i, the transition from a land tenure system characterised by use-rights of the high chief, other chiefs, and maka‘āinana[7] or common people to one of private land ownership occurred in a process called the Māhele. Māhele means division or share, and designates a series of steps undertaken by the Hawaiian Kingdom in the mid-19th century, separating out the interests of the government, king, chiefs and people in all the lands of Hawai‘i.[8] Complex reasons have been given for this voluntary transformation of the land tenure system by Kamehameha III and the chiefs – among them, increasing the status of the new kingdom-state among the independent sovereign states; the fear that Hawai‘i would be forcibly annexed by one of the Western powers, in which case private property rights would be recognised; pressure from Western business interests desiring to own land so that profits could be made in sugar and ranching; and the belief, expressed primarily by the Protestant missionaries, that owning land would make Native Hawaiians more industrious, give them a secure living, and bring them into the "civilised" world and thereby stem the drastic decline in the Hawaiian population.[9]

One formulation for the Māhele, as set out in the principles adopted by the Board of Commissioners to Quiet Land Titles, which had been established to settle all private claims to land existing prior to 10 December 1845, envisioned one-third of the lands going to the King, one-third to the chiefs, and the final third to native tenants.[10] Indeed, this was in keeping with Hawai‘i's first constitution, the Constitution of 1840, which declared that the land and its resources were not the private property of the King but "belonged to the Chiefs and the people in common, of whom [the King] was the head and had the management of the landed property".[11]

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7 Maka‘āinana means commoner, populace, people in general, and literally "people that attend the land". Mary Kawena Pukui and Samuel H. Elbert Hawaiian Dictionary (University of Hawai‘i Press, Honolulu, 1986) ["Hawaiian Dictionary"].

8 For a discussion of the division of lands between Kamehameha III and the chiefs and konohiki, see Lilikalā Kame‘eleihiwa Native Lands and Foreign Desires (Bishop Museum Press, Hawai‘i) at 227-285. Earlier scholars set the number of ali‘i receiving lands as 245; see, for instance, Marion Kelly "Land Tenure in Hawai‘i" (1980, Fall-Winter) 7(2) Amerasia Journal 65 (Asian American Studies Center, University of California at Los Angeles).

9 For various perspectives on the factors leading to the Māhele, see generally, Kame‘eleihiwa, above note 8, at 169-225; Robert H Stauffer Kahana: How the Land Was Lost (University of Hawai‘i Press, Honolulu, 2003) at 9-76; Stuart Banner Possessing the Pacific (Harvard University Press, Cambridge, Massachusetts) at 128-162; Jon Van Dyke Who Owns the Crown Lands of Hawai‘i? (University of Hawai‘i Press, Honolulu, 2007) at 19-58.

10 "Principles Adopted by the Board of Commissioners to Quiet Land Titles (Aug. 20, 1846)", reprinted in Revised Laws of Hawaii of 1925 (vol 2) at 2124 ["2 Revised Laws 1925"].

11 Haw. Const. of 1840, reprinted in Lorrin A Thurston (ed) The Fundamental Law of Hawaii 3 (The *Hawaiian* Gazette Company Ltd, Honolulu, 1904).

Beginning on 27 January 1848, all lands in Hawai'i were divided between Kamehameha III and the chiefs and recorded in the Māhele Book. The King quit-claimed his interest in specific traditional land units called ahupua'a and 'ili,[12] and the chiefs quit-claimed their interests in the balance of the lands to the King. These quit-claims did not confer title, but merely acknowledged that the King had no claim to these specific lands of the chiefs and the chiefs had no claim to the King's lands.[13]

After this initial division, the chiefs or konohiki[14] were still required to go before a land commission and make claim to their lands.[15] In addition, they had to pay a commutation tax of one-third the value of the unimproved land or cede one-third of the land to the government. The konohiki were entitled to receive full allodial title to their lands in the form of royal patents. These awards specifically reserved the rights of the native tenants by including the phrase "Koe nae no kuleana o na kanaka maloko"[16] or similar wording. The konohiki received awards to lands by name only, with the ancient boundaries pertaining until a survey could be made. Subsequently, in 1862, a Boundary Commission was established to settle questions of the boundaries of the ahupua'a and 'ili awarded by name only.[17]

After the last division between Kamehameha III and the chiefs on 7 March 1848, the king held approximately 2.5 million acres or 60.3 per cent of the total land, while the chiefs had received a total approximating 1.6 million

12 An ahupua'a is a land division, usually extending from the uplands to the sea (Hawaiian Dictionary). An 'ili is a smaller land division, usually within an ahupua'a and next in importance to the ahupua'a (ibid). An early Hawai'i case explained that traditionally the ahupua'a afforded to the chief and people "a fishery residence at the warm seaside, together with the products of the high lands, such as fuel, canoe timber, mountain birds, and the right-of-way to the same, and all the varied products of the intermediate land as might be suitable to the soil and climate of the different altitudes from sea soil to mountainside or top." In re Boundaries of Pulehunui, 4 Haw. 239, 241 (1879).

13 Louis Cannelora The Origin of Hawaii Land Titles and of the Rights of Native Tenants (Security Title Corporation, Honolulu, 1974) at 15; see Kanoa v Meek, 6 Haw. 63 (1871).

14 Konohiki is defined as a "headman of an ahupua'a land division under the chief" (Hawaiian Dictionary). Subsequent to the Māhele, the term was used to indicate the grantee of an ahupua'a or 'ili and the grantee's successor. Robinson v Ariyoshi, 65 Haw. 641, 670, n.26, 658 P.2d 287, 307 (1982).

15 The konohiki were given several extensions of time in which to file and prove their claims. See Act of August 10, 1854, reprinted in 2 Revised Laws 1925, above note 10, at 2147; Act of August 24, 1860, reprinted in 2 Revised Laws 1925, at 2148; and Act of December 16, 1892, reprinted in 2 Revised Laws 1925, at 2151. The last act allowed claims until 1 January 1895, after which all lands not claimed reverted to the government.

16 In Kalipi v Hawaiian Trust Co. Ltd, 66 Haw. 1, 656 P.2d 745 (1982); this phrase was translated as: "The kuleanas [sic] of the people therein are excepted."

17 Act of August 23, 1862, reprinted in 2 Revised Laws 1925.

acres.[18] The king then divided his lands into two parts. The larger portion, approximately 1.5 million acres, he "set apart forever to the chiefs and people" of the kingdom.[19] Later in the year, the legislative council ratified and accepted the lands conveyed to the chiefs and people, declaring them to be "set apart as the lands of the Hawaiian government, subject always to the rights of tenants".[20] These lands were designated as Government Lands.

Kamehameha III retained for himself, his heirs and successors the remaining lands, nearly 1 million acres.[21] These private lands became known as the King's Lands. When this action was ratified by the legislature, the King's Lands were also made subject to the rights of native tenants.[22]

Consequently, as a result of the Māhele, all lands of the king, government and chiefs were given *subject to the rights of native tenants*. It wasn't until 1850, however, that a process was established to more firmly delineate the rights of native tenants.

### A. *The Kuleana Act*

The final step in the Māhele process was dividing out the interests of the maka'āinana or common people. The Kuleana Act of 6 August 1850 authorised the land commission to award fee simple title to native tenants for their plots of land.[23] Hoa'āina or tenant farmers could apply for their own plots of land or kuleana.[24] A kuleana parcel could come from lands of the king, government, or chiefs. Moreover, native tenants were not required to pay a commutation tax since the chief or konohiki of the ahupua'a or 'ili kūpono in which the kuleana was located was responsible for the commutation. Consequently, upon the death of a kuleana owner without an heir, the kuleana escheated to the owner of the ahupua'a or 'ili kūpono who had a reversionary interest as a result of paying the commutation.[25]

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18 Jon J Chinen The Great Mahele: Hawaii's Land Division of 1848 (University of Hawai'i Press, Honolulu, 1958) at 25, 31.

19 Van Dyke, above note 9, at 42, gives the following totals: the King's lands constituted 984,000 acres, the Government Lands were 1,523,000 acres, and the lands granted to the Chiefs totalled 1,619,000 acres.

20 Act of June 7, 1848, reprinted in 2 Revised Laws 1925, above note 10, at 2152-2176 (listing of lands and act ratifying division of lands).

21 See Estate of Kamehameha IV, 2 Haw. 715, 722-723 (1864).

22 Act of June 7, 1848, above note 20.

23 Act of August 6, 1850, reprinted in 2 Revised Laws 1925, above note 10, at 2141-2142 ["Kuleana Act"] — In this context, kuleana means a small piece of property (Hawaiian Dictionary).

24 Ibid.

25 Chinen, above note 18, at 30 (1958).

While kuleana lands were generally among the richest and most fertile in the islands, there were a number of restrictions placed on kuleana claims. First, kuleana could only include the land that a tenant had actually cultivated plus a houselot of not more than a quarter acre.[26] Second, the native tenant was required to pay for a survey of the land as well as bring two witnesses to testify to the tenant's right to the land.[27]

One scholar estimates that the Land Commission approved 8,421 awards, averaging less than 3 acres per award, to 29 per cent of the adult Native Hawaiian male population.[28] The original plan adopted by the king and chiefs for division of the land had stated that the maka'āinana were to receive, after the king partitioned out his personal lands, one-third of the land of Hawai'i. However, only 28,658 acres, much less than one per cent of the total land, went to the maka'āinana through this claims process.[29]

Recognising that not all natives would be able to claim kuleana, another provision of the Kuleana Act allowed natives to purchase between one and 50 acres of government lands at a minimum of 50 cents an acre.[30] One researcher estimates that the maka'āinana received another 150,000 acres through this provision of the Kuleana Act.[31] Moreover, it is generally conceded that although the maka'āinana received fewer acres, these lands were the most fertile and productive.[32]

The only section of the Kuleana Act that has survived is section 7, codified today as Hawai'i Revised Statutes ("Haw. Rev. Stat.") § 7–1:[33]

> **Building materials, water, etc.; landlords' titles subject to tenants' use.** Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running

26 Kuleana Act, above note 23, sections 5-6.

27 Land Commission Principles, reprinted in 2 Revised Laws 1925, above note 10, at 2134.

28 Kame'eleihiwa, above note 8, at 295-297, citing Marion Kelly "Results of the Great Mahele of 1848 and the Kuleana Act of 1850" (unpublished manuscript).

29 Jon J Chinen They Cried for Help (Xlibris Corporation, 2002) at 141-142, citing the 1896 Thrum's (Hawaiian) Annual.

30 Kuleana Act, above note 23, section 4.

31 Donovan Preza, MA Candidate in Political Science, lecture to Native Hawaiian Rights Class (University of Hawai'i at Mānoa, 15 September 2008).

32 Stauffer, above note 9, at 5.

33 Haw. Rev. Stat. § 7–1 (2008).

> water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

The Kuleana Act's legislative history indicates that this section was included at the request of Kamehameha III. The Privy Council minutes show Kamehameha III's concern that "a little bit of land even with allodial title, if they [the people] were cut off from all other privileges, would be of very little value".[34] The Privy Council thus adopted the King's suggestion:[35]

> [T]he proposition of the King, which he inserted as the seventh clause of the law, a rule for the claims of the common people to go to the mountains, and the seas attached to their own particular land exclusively, is agreed to[.]

The original version of this section required the tenant to seek the consent of the konohiki in exercising these rights. The consent provisions were eliminated in 1851, the legislature reciting that "many difficulties and complaints have arisen, from the bad feeling existing on account of the Konohiki's [sic] forbidding the tenants on the lands enjoying the benefits that have been by law given them".[36]

The Kuleana Act provided native tenants the right of access to their kuleana and also gave them unobstructed access within the ahupua'a to obtain items necessary for their subsistence and to make their lands productive. However, the first Hawai'i case to discuss the provision interpreted it narrowly to disallow any customary rights not specifically identified in section 7.

### B. *Oni v Meek*, 2 Haw. 87 (1858)

The first Hawai'i Supreme Court case to discuss the scope of the rights under section 7 of the Kuleana Act was *Oni v Meek* (1858).[37] Oni, a tenant of the ahupua'a of Honouliuli, O'ahu, filed suit against John Meek, who had leased the entire ahupua'a from its konohiki. Oni brought suit when some of his horses, which had been pastured on Meek's land, were impounded and sold

34 3B Privy Council Record 681, 713 (1850).
35 3B Privy Council Record 681, 763 (1850).
36 Act of July 11, 1851, Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 98–99 (1851).
37 Oni v Meek, 2 Haw. 87 (1858).

by Meek. Oni claimed that he had a right to pasture his horses, presenting two legal bases for that right: (1) custom; and (2) the Act of 1846, predecessor to the Kuleana Act, which allowed a tenant the right of pasturage.[38]

The Hawai'i Supreme Court rejected both arguments. First, the Court appeared to reject the idea that any form of custom had survived the change to a fee simple land tenure system and enactment of the Kuleana Act, stating that, "the custom contended for is so unreasonable, so uncertain and so repugnant to the spirit of the present laws, that it ought not to be sustained by judicial authority".[39] The Court continued:[40]

> it is perfectly clear that, if the plaintiff is a hoaaina [native tenant],[41] holding his land by virtue of a fee simple award from the Land Commission, he has no pretense for claiming a right of pasturage by *custom*, for so far as that right ever was customary, it was annexed to the holding of land by a far different tenure from that by which he now holds.

The Court also concluded that while the Act of 1846 was not expressly repealed by subsequent legislation, it was implicitly repealed by the passage of the 1850 Kuleana Act.[42] The Court noted several unsuccessful attempts after 1850 to include a right of pasturage in the Kuleana Act.[43] Moreover, the Kuleana Act had been amended after 1850, but the right of pasturage had not been

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38 Ibid, at 91–92; see also Joint Resolutions on the Subject of Rights in Lands and the Leasing, Purchasing, and Dividing of the Same, § 1 (Nov. 7, 1846), 2 Haw. L. 1847, at 70, reprinted in 2 Revised Laws 1925, above note 10, at 2193. The Joint Resolutions provided, in pertinent part, that:

> The rights of the Hoaaina in the land, consists of his own taro patches, and all other places which he himself cultivates for his own use; and if he wish to extend his cultivation on unoccupied parts, he has the right to do so. He has also rights in the grass land [sic], if there be any under his care, and he may take grass for his own use or for sale, and may also take fuel and timber from the mountains for himself. He may also pasture his horse and cow and other animals on the land, but not in such numbers as to prevent the konohiki from pasturing his. He cannot make agreements with others for the pasturage of their animals without the consent of his konohiki, and the Minister of the Interior.

Joint Resolutions, supra, cited in Oni, 2 Haw. at 91–92.

39 Ibid, at 90.

40 Ibid.

41 Hoa'āina means tenant (Hawaiian Dictionary).

42 Oni, 2 Haw. at 94 (finding that "several of the provisions of the [Kuleana Act (Aug. 6, 1850)] are clearly inconsistent with those of the [Joint Resolutions (Nov. 7, 1846)], and … so far as this is true, the provisions of 1846 must be held, by necessary implication, to be repealed by those of 1850").

43 Ibid, at 95 (noting that "during several subsequent sessions of the Legislature, petitions were presented for the enactment of a law granting to the common people the right of pasturage on the lands of the konohikis, but without success").

included.[44] Pointing to these unsuccessful attempts to amend the enumerated rights of tenants in the Kuleana Act, the Court stated, "it was the intention of the Legislature to declare, in this enactment, all the specific rights of the hoaaina (excepting fishing rights) which should be held to prevail against the fee simple title of the konohiki".[45] Thus, *Oni* construed the Kuleana Act as the exclusive source of rights reserved to ahupua'a tenants.

For over a hundred years, the *Oni* case appeared to foreclose claims based on custom, standing for the proposition that all customary rights of native tenants had been abrogated except for those rights explicitly listed in Haw. Rev. Stat. section 7-1. In 1995, however, the Hawai'i Supreme Court, in a case discussed in detail below, explained that "*Oni* merely rejected one particular claim based upon an apparently non-traditional practice that had not achieved customary status in the area where the right was asserted."[46]

### C. *Hawai'i Revised Statutes section 1–1*

The Hawaiian usage exception, set forth in Haw. Rev. Stat. § 1–1, is a second basis for customary and traditional rights:[47]

> **Common law of the State; exceptions.** The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage;* provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

Since section 1-1 is derived from section 5 of Act 57, approved on 25 November 1892, Hawai'i Courts have held that "Hawaiian usage" is usage that predates 25 November 1892.[48]

In *Public Access Shoreline Hawaii v Hawai'i County Planning Commission* (1995) ("*PASH*"),[49] discussed below, the Hawai'i Supreme Court concluded that section 1–1 "represents the codification of custom as it applies in our State".[50] In reviewing section 1-1, the Court noted that the

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44 Ibid.
45 Ibid.
46 PASH, 79 Hawai'i at 441, 903 P.2d, at 1262.
47 Haw. Rev. Stat. § 1–1 (2004) (emphasis added).
48 State v Zimring, 52 Haw. 472, 474-74, 479 P.2d 202, 204 (1970).
49 PASH, 79 Hawai'i 425, 903 P.2d 1246 (1995), aff'g 79 Hawai'i 246, 900 P.2d 1313 (App. 1993), cert. denied, 517 U.S. 1163 (1996).
50 Ibid, at 447, 903 P.2d at 1268.

principles codified in the statute have a much earlier origin.[51] Custom and usage governed the Kingdom almost exclusively until the promulgation of the Declaration of Rights in 1839.[52] As the government developed further, oral traditions and laws were codified in written form. The third Act of Kamehameha III created an independent Judiciary. The Judiciary was given the authority to cite and adopt:[53]

> the reasonings and analysis of the common law, and of the civil law [of other countries] … so far as they are deemed to be founded in justice, and not in conflict with the laws and usages of this kingdom.

When the Kingdom adopted a Civil Code in 1859, section 14 included "received usage" as a source of law.[54] On 25 November 1892, the Judiciary was reorganised, repealing the relevant section in the 1859 Civil Code and adopting language similar to that found in section 1-1.[55] The original language, however, referred to the common law and Constitution of the Hawaiian Islands, "or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage". The Organic Act of 1900, which organised the territorial government under US control, made this provision applicable to the Territory of Hawai'i.[56] When the laws of the Territory were reorganised and compiled in 1905, that statute became chapter 1, section 1 of the Revised Laws of Hawai'i.[57]

## III. 1978 Constitutional Amendment and Subsequent Cases

As noted above, in 1978, the Hawai'i Constitution was amended to include a provision protecting the traditional and customary rights of ahupua'a tenants. A review of the Committee Reports and Constitutional Convention debates on the amendment indicates that the provision was meant to be liberally construed and to cover the widest possible range of customary rights.[58] The debates particularly highlight the various perspectives on whether the rights to be protected by the amendment were those already established in Haw. Rev. Stats. Section 1-1 and 7-1 or whether the section granted "new" rights.

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51 Ibid, at 437, 903 P.2d at 1258, n.21.

52 See 1 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 3 (1845–1846).

53 Act of September 7, 1847, ch. I, § IV; 2 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 5 (1847).

54 See Civil Code ch. 3 § 14 (1859).

55 See Session Laws ch. LVII, § 5 (1892).

56 See An Act to Provide a Government for the Territory of Hawaii (Organic Act) §§ 6, 10, 32, Act of Apr. 30, 1900, c. 339, 31 Stat. 141.

57 See Revised Laws of Haw. ch. 1, § 1 (1905).

58 Standing Comm. Rep. No. 57 on Hawaiian Affairs Prop. No. 12, reprinted in 1 Proceedings of the Constitutional Convention of Hawaii of 1978 (1980) at 640.

Chair of the Hawaiian Affairs Committee, Delegate Frenchy De Soto, as well as Delegate Hoe, a member of the committee, stated several times that no new rights were being established.[59] Delegate Waihee made the point that the provision was a vehicle for an individual to prove the existence of traditional rights and that if the burden of proof was met, the right would then become subject to state regulation.[60] Delegate Burgess, who opposed the amendment, clearly believed that the section went beyond reaffirming existing rights and granted new rights.[61] There was overwhelming support for the amendment, which easily passed out of the convention. Although the amendment was enacted in 1978, it was not until 1982 that the Hawai'i Supreme Court decided the first case relating to the provision.

### A. *Kalipi v Hawaiian Trust Co.*

In *Kalipi v Hawaiian Trust Co.* (1982),[62] its first case on Native Hawaiian gathering rights, the Hawai'i Supreme Court stated:[63]

> We recognize that permitting access to private property for the purpose of gathering natural products may indeed conflict with the exclusivity traditionally associated with fee simple ownership of land. But any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail. For the Court's obligation to preserve and enforce such traditional rights is a part of our Hawaii State Constitution.

The Court continued, citing the full text of Article XII, section 7, and stating, "it is this expression of policy which must guide our determinations".[64]

In this case, William Kalipi, who owned a taro field in Manawai and an adjoining houselot in 'Ōhi'a, Moloka'i, filed suit against owners of the ahupua'a of Manawai and 'Ōhi'a when he was denied unrestricted gathering rights in those ahupua'a. Kalipi had been raised on the houselot and lived there and worked the taro field until 1975, but had since moved to Keawenui, a neighbouring ahupua'a. Kalipi sought to gather certain items for subsistence

59 Second Reading, Comm. of the Whole Rep. No. 12 on Hawn. Aff. Prop. No. 12, reprinted in 1 Proceedings of the Constitutional Convention of Hawaii of 1978 (1980) at 277.
60 Ibid, at 278.
61 Second Reading, Comm. of the Whole Rep. No. 12 on Hawn. Aff. Prop. No. 12, reprinted in 1 Proceedings of the Constitutional Convention of Hawaii of 1978 (1980) at 275.
62 66 Haw. 1, 656 P.2d 745 (1982).
63 66 Haw. 1, 4, 656 P.2d 745, 748.
64 Ibid.

and medicinal purposes, citing three sources for his claim – Haw. Rev. Stat. sections 7-1 and 1-1 and language in the original title documents of the relevant ahupua'a that reserved the people's rights.[65]

With regard to Kalipi's claims based on Haw. Rev. Stat. section 7-1,[66] which enumerates items that can be gathered within an ahupua'a by a native tenant – firewood, house-timber, aho cord, thatch, or kī-leaf,[67] the Court held that a native tenant asserting a right to gather under section 7–1 must meet three conditions: (1) the native tenant must reside within the relevant ahupua'a; (2) the right to gather must be exercised upon undeveloped lands; and (3) the right must be exercised in order to practise Hawaiian customs and traditions.[68]

Although section 7-1 did not contain an "undeveloped lands" requirement, the Court reasoned that it must be deemed a condition precedent, since gathering on developed lands would conflict with modern property law as well the "cooperation and non-interference with the well-being of other residents" that were integral parts of the traditional "Hawaiian way of life".[69] In the Court's view, only if all conditions were satisfied would a tenant have a right to gather; moreover, gathering would be restricted solely to those items expressly enumerated in the statute.[70] In an important footnote, the Court stated that the rights under section 7-1 are rights of access and collection:[71]

> They do not include any inherent interest in the natural objects themselves until they are reduced to the gatherer's possession. As such those asserting the rights cannot prevent the diminution or destruction of those things they seek. The rights therefore do not prevent owners from developing lands.

Unfortunately, Kalipi did not physically reside within either the ahupua'a of Manawai or 'Ōhi'a, and thus, under the Court's formulation, could not assert rights under Haw. Rev. Stat. section 7–1.[72]

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65 Ibid, at 3-4, 656 P.2d at 747.

66 Ibid, at 4-5, 656 P.2d at 747-748.

67 Haw. Rev. Stat. § 7–1 (2004).

68 Kalipi, 66 Haw. at 7-8, 656 P.2d at 749 (stating that "[w]e believe that this balance [between customary practices and private property rights] is struck, consistent with our constitutional mandate and the language and intent of the statute, by interpreting the gathering rights of [H.R.S.] § 7–1 to assure that lawful occupants of an ahupuaa may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupuaa to gather those items enumerated in the statute").

69 Ibid, at 9, 656 P.2d at 750.

70 Ibid, at 7-9, 656 P.2d at 749-50.

71 Ibid, at 8, 656 P.2d at 749, n.2.

72 Ibid, at 9, 656 P.2d at 750.

In reviewing Kalipi's claims under Haw. Rev. Stat. section 1-1, the Court articulated a balancing test in which the retention of a Hawaiian tradition is determined first by deciding if a custom has continued in a particular area and, second, by balancing the respective interests of the practitioner and harm to the landowner. The Court observed:[73]

> We perceive the Hawaiian usage exception to the adoption of the English common law to represent an attempt on the part of the framers of the statute to avoid results inappropriate to the isles' inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the common law. The statutory exception to the common law is thus akin to the English doctrine of custom whereby practices and privileges unique to particular districts continued to apply to the residents of those districts even though in contravention of the common law. This, however, is not to say that we find that all the requisite elements of the doctrine of custom were necessarily incorporated in § 1–1. Rather, we believe that the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area.

The Court also clarified that *Oni v Meek* rejected a particular custom – pasturage – as opposed to custom in general. The Court thus interpreted section 1-1 as "a vehicle for the continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interests of others".[74] Applying the balancing test, the *Kalipi* Court held that where practices associated with the Hawaiian way of life "have, without harm to anyone, been continued, … the reference to Hawaiian usage in § 1–1 insures their continuance for so long as no actual harm is done thereby".[75]

Because there was no evidence in the record to find that gathering rights customarily extended to persons who did not reside within the ahupua'a in which the rights are asserted, and because Kalipi was not a resident of the ahupua'a, the Court held that he did not have gathering rights under Haw. Rev. Stat. section 1–1.[76]

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73 Ibid, at 10, 656 P.2d at 750-51 (citations omitted).

74 Ibid, at 1, 656 P.2d at 752.

75 Ibid, at 10, 656 P.2d at 751. The Court clearly stated that "[t]hese [practices] include the gathering of items not delineated in [H.R.S.] § 7–1 and the use of defendants' lands for spiritual and other purposes". Ibid, at 10, 656 P.2d at 751 n.4.

76 Ibid, at 12-13, 656 P.2d at 752.

Finally, with regard to Kalipi's claim under the native tenants right reservation found in the original awards of the two ahupua'a, the Court intimated that an earlier case[77] that appeared to limit such rights was not dispositive. Nevertheless, the Court concluded that as with the rights preserved by sections 7-1 or 1-1, traditional gathering rights do not accrue to persons who are not residents of the ahupua'a in which the rights are sought to be asserted.[78]

### B. *Pele Defense Fund v Paty*

Ten years later, in *Pele Defense Fund v Paty* (1992),[79] the Hawai'i Supreme Court recognised that:[80]

> native Hawaiian rights protected by article XII, section 7 [of the Hawai'i Constitution] may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner.

In this case, Native Hawaiian residents of ahupua'a neighbouring a large tract of land, Wao Kele O Puna, on the Island of Hawai'i, based their claims on Haw. Rev. Stat. section 1-1 and Article XII, section 7. In the trial Court, they had submitted evidence to support their claims concerning the exercise of subsistence, cultural and religious practices according to ancient custom and tradition in the Wao Kele O Puna area.[81]

The Hawai'i Supreme Court explained that although the *Kalipi* case had limited gathering rights under section 7-1 to the ahupua'a in which a native tenants lives, the Court in *Kalipi* also held that section 1-1's "Hawaiian usage" clause may establish certain customary Hawaiian rights beyond those found in section 7-1.[82] The *Pele* Court also reviewed the proceedings of the 1978 Constitutional Convention, noting that the Hawaiian Affairs Committee "contemplated that some traditional rights might extend beyond the ahupua'a" and found persuasive the Hawaiian Affairs Committee's statement that the amendment should not be narrowly construed.[83] The Court concluded:[84]

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77 In Territory v Liliuokalani, 14 Haw. 88, 95 (1902), the Hawai'i Supreme Court held that "the words 'koe nae ke kuleana o na kanaka [reserving however the people's kuleana rights therein]' … refer to the house lots and taro patches and gardens of tenants living on land within the boundaries of the larger tract granted" and did not incorporate any public right to the use of certain shoreline areas included within a grant of land.

78 Kalipi, 66 Haw. at 12; 656 P.2d at 752.

79 73 Hawai'i 578, 837 P.2d 1247 (1992), cert. denied, 507 U.S. 918 (1993).

80 Ibid, at 620, 837 P.2d at 1272.

81 Ibid, at 618, 620–21, 837 P.2d, at 1271, 1272.

82 Ibid, at 619, 837 P.2d at 1271.

83 Ibid.

84 Ibid, at 621, 837 P.2d at 1272.

> if it can be shown that Wao Kele ʻO Puna was a traditional gathering area utilized by the tenants of the abutting ahupuaʻa, and that the other requirements of *Kalipi* are met in this case, then PDF members … may have a right to enter the undeveloped areas of [Wao Kele O Puna] to exercise their traditional practices.

In a footnote, the Court also reiterated its earlier holding that Article XII, section 7, does not require the preservation of lands in their natural state.[85]

On remand in *Pele Defense Fund v Estate of James Campbell* (2002),[86] the trial Court ruled in favour of Pele Defense Fund, determining that customarily and traditionally exercised subsistence and cultural activities actually practised by Native Hawaiians in the Puna area prior to 1892 were not limited to one's ahupuaʻa of residence or by common law concepts associated with tenancy or land ownership.

### C. *Public Access Shoreline Hawaii v Hawaiʻi County Planning Commission*

In *Public Access Shoreline Hawaii v Hawaiʻi County Planning Commission* (1995) ("*PASH*"),[87] Defendant Nansay Hawaiʻi ("Nansay") had applied for a Special Management Area (SMA) permit to develop a resort complex on the island of Hawaiʻi, and the shoreline organisation, Public Access Shoreline Hawaiʻi ("PASH"), which opposed the development, filed a request for a contested case hearing before the Hawaiʻi Planning Commission. The Planning Commission denied PASH's request for a hearing and issued the SMA permit and PASH filed suit. The trial Court vacated the SMA permit and directed the Planning Commission to hold a contested case hearing in which PASH would be allowed to participate. On appeal, the Hawaiʻi Supreme Court held that: (1) the circuit Court had jurisdiction to consider the claims; (2) PASH had standing, so a contested case hearing should be held; and, most importantly, (3) Native Hawaiians retain rights to pursue traditional and customary activities, since land patents in Hawaiʻi confirm only a limited property interest when compared with Western land patents/concepts of property.

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85 Ibid, at 621, 837 P.2d at 1272, n.36.

86 Pele Defense Fund v Paty, No. 89–089 Haw. 3d Cir. Aug. 26, 2002 (Findings of Fact, Conclusions of Law, and Order) (on file with author).

87 PASH, 79 Hawaiʻi at 429, 903 P.2d at 1250.

Nansay Hawaii did not contest PASH's claims on the exercise of traditional native Hawaiian gathering rights, including gathering for food and fishing for 'ōpae, or shrimp,[88] but argued that "[w]hen the owner develops land, the gathering rights disappear".[89] The Court rejected this argument, holding that the State is obligated to protect the reasonable exercise of traditional and customary rights to the extent feasible.[90] The Court's opinion traced the origins of Haw. Rev. Stat. section 1–1 back to the third Act of Kamehameha III[91] authorising the adoption of common law principles, provided they were "not in conflict with the laws and usages of this kingdom".[92] The *PASH* Court further stressed that "the precise nature and scope of the rights retained by [Haw. Rev. Stat.] § 1–1 … depend upon the particular circumstances of each case".[93]

The Court devoted considerable attention to the extent that Haw. Rev. Stat. section 1-1 preserved customary practices, noting that *Kalipi* specifically refused to decide the "ultimate scope" of traditional rights under section 1-1. The Court also distinguished the doctrine of custom in Hawai'i in several ways. First, contrary to the "time immemorial" standard used by English and American common law, traditional and customary practices in Hawai'i must be established in practice by 25 November 1892.[94] Second, continuous exercise of the right is not required, although the custom may become more difficult to prove.[95] The *PASH* Court stated, "[t]he right of each ahupua'a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site".[96]

The Court set out a test for the doctrine of custom, requiring that a custom be *consistent when measured against other customs*;[97] a practice be *certain in an objective sense*, "[A] particular custom is certain if it is objectively defined and applied; certainty is not subjectively determined";[98] and a traditional

88 Ibid, at 430, 903 P.2d at 1251 n.6 (noting that Nansay "did not directly dispute the assertion that unnamed members of PASH possess traditional native Hawaiian gathering rights at Kohanaiki, including food gathering and fishing for 'ōpae, or shrimp, which are harvested from the anchialline ponds located on Nansay's proposed development site").

89 Second Supplemental Brief (Opening Brief) for Petitioner-Appellee-Appellant Nansay Hawaii at 19, PASH, 79 Hawai'i 425, 903 P.2d 1246 (1995).

90 PASH, 79 Hawai'i at 451, 903 P.2d at 1272.

91 Ibid, at 437, 903 P.2d at 1258 n.21.

92 Ibid.

93 Ibid, at 438, 440, 903 P.2d at 1259, 1261.

94 Ibid, at 447, 903 P.2d at 1268.

95 Ibid, at 441, 903 P.2d at1262 n.26 (citation omitted).

96 Ibid, at 450, 903 P.2d at 1271.

97 Ibid, at 447, 903 P.2d at 1268 (internal quotation marks omitted).

98 Ibid (internal quotation marks omitted).

use be *exercised in a reasonable manner*.[99] Defining the reasonable use requirement, the Court further explained that the balance leans in favour of establishing a use in the sense that "even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no 'good legal reason' against it".[100]

The Court also held that the State has the authority to reconcile competing interests;[101] thus, "[d]epending on the circumstances of each case, once land has reached the point of 'full development' it *may* be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights on such property".[102] The *PASH* Court, however, clearly stated that:[103]

> [a]lthough access is only *guaranteed* in connection with undeveloped lands, and article XII, section 7 [of the Hawai'i Constitution] does not *require* the preservation of such lands, the State does not have the unfettered discretion to regulate the[se] rights … out of existence.

The *PASH* Court also clarified that:[104]

> those persons who are "descendants of native Hawaiians who inhabited the islands prior to 1778," and who assert otherwise valid customary and traditional Hawaiian rights under HRS § 1–1, are entitled to protection regardless of their blood quantum.

The *PASH* Court, however, declined to decide whether descendants of non-Hawaiian citizens of the Hawaiian Kingdom are entitled to such protection and expressly reserved comment on the question whether non-Hawaiian members of an 'ohana may "legitimately claim rights protected by article XII, section 7 of the state constitution and H.R.S. § 1–1".[105]

While recognising that "the western concept of exclusivity is not universally applicable in Hawai'i", the Court addressed concerns that the ruling could theoretically lead to disruption by relying on non-confrontational aspects of traditional Hawaiian culture, which should "minimize potential disturbances". The Court also pointed out that "the State retains the ability to reconcile competing interests under article XII, section 7".[106] The State's regulatory

99 Ibid, at 447, 903 P.2d at 1268 (citation and internal quotation marks omitted).

100 Ibid (citation and internal quotation marks omitted).

101 Ibid.

102 Ibid, at 451, 903 P.2d at 1272 (emphasis added).

103 Ibid (emphasis added); see also ibid at 441, 903 P.2d at 1262 n.26 (stating that one of the requirements for custom is that the use or right at issue is "obligatory or compulsory (when established)").

104 Ibid, at 449, 903 P.2d at 1270.

105 Ibid, at 449, 903 P.2d at 1270 n.41. 'Ohana is a family or kin group (Hawaiian Dictionary).

106 Ibid, at 447, 903 P.2d at 1268.

authority does not provide it with "the unfettered discretion to regulate the rights of ahupua'a tenants out of existence".[107] However, the State is authorised to permit private property owners to exclude persons "pursuing non-traditional practices or exercising otherwise valid customary rights in an *unreasonable* manner".[108]

The Hawai'i Supreme Court's guidance in *PASH* was never applied in that case; the landowner withdrew its permit application and the proceedings were terminated.[109]

### D. *State v Hanapi*

In a criminal case, *State v Hanapi* (1998),[110] the Hawai'i Supreme Court held that "it is the obligation of the person claiming the exercise of a native Hawaiian right to demonstrate that the right is protected".[111] The defendant, Alapa'i Hanapī, lived in the ahupua'a of 'Aha'ino on the island of Moloka'i, on property adjoining the two fishponds, Kihaloko and Waihilahila.[112] The owner of land next to Hanapī's property had graded and filled the area near the ponds in apparent violation of US Army Corps of Engineers wetland regulations. The landowner thus conducted a voluntary, unsupervised restoration of the area, with the advice and oversight of a consultant archaeologist.

Hanapī saw the landowner's actions as a "desecration of [a] traditional ancestral cultural site",[113] and felt that it was his obligation as a Native Hawaiian tenant to perform religious and traditional ceremonies to heal the land.[114] Thus, Hanapī twice entered the property to observe and monitor the restoration.[115] On a third visit, Hanapī was ordered off the property; Hanapī refused and was arrested and charged with second-degree criminal trespass.

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107 Ibid, at 451, 903 P.2d at 1272; see also ibid at 442, 903 P.2d at 1263 ("[T]he regulatory power provided in article XII, section 7 does not justify summary extinguishment of such [traditional and customary] rights by the State merely because they are deemed inconsistent with generally understood elements of the western doctrine of 'property'.").

108 Ibid at 442, 903 P.2d at 1263 (emphasis added).

109 Hugh Clark "Builder Withdraws its Kona Resort Application" Honolulu Advertiser (Hawai'i, 2 August 1996) at A5.

110 89 Hawai'i 177, 970 P.2d 485 (1998), recons. denied, 1999 Haw. LEXIS 34 (Haw. Feb. 8, 1999).

111 Ibid, at 184, 970 P.2d at 492.

112 Ibid, at 178, 970 P.2d at 486.

113 Ibid.

114 Ibid, at 181, 970 P.2d at 489.

115 Ibid, at 178, 970 P.2d at 486.

At trial, Hanapī represented himself. The trial Court repeatedly sustained the prosecution's objections as Hanapī asserted a defence of privilege based upon his constitutional rights as a Native Hawaiian.[116] Hanapī persisted and was able to elicit some testimony in support of his defence.[117] Ultimately, Hanapī was convicted of the criminal trespass charge.[118] On appeal, the Hawai'i Supreme Court concluded that the district Court's errors were harmless; Hanapī's conviction was affirmed.[119] The Court stated, however, that "constitutionally protected native Hawaiian rights, reasonably exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes".[120] The Court then set forth three minimum requirements that must be met for a defendant to successfully assert a defence based on a constitutionally protected Native Hawaiian traditional and customary right:[121]

First, a defendant must qualify as a "native Hawaiian", regardless of blood quantum, as defined in *PASH* – a descendant of the inhabitants of the Hawaiian islands prior to 1778.[122]

Second, a defendant must "establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice".[123] The Court also stated that in order to establish the existence of a traditional or customary Native Hawaiian practice, there must be an "adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice".[124] Such a foundation can be made through the testimony of kama'āina witnesses or experts as proof of Hawaiian custom and usage.[125]

116 Ibid, at 179-181, 970 P.2d at 487-89.
117 Ibid, at 185, 970 P.2d at 493.
118 Ibid, at 181, 970 P.2d at 489.
119 Ibid, at 185, 188, 970 P.2d at 493, 496.
120 Ibid, at 184, 940 P.2d at 492.
121 Ibid, at 185-86, 970 P.2d at 493-94.
122 Ibid, at 186, 970 P.2d at 494.
123 Ibid, at 186, 970 P.2d at 494. The Court noted that, although some customary and traditional native Hawaiian rights are codified in the Hawai'i Constitution, article XII, section 7, or in H.R.S. sections 1–1 and 7–1, "[t]he fact that the claimed right is not specifically enumerated in the Constitution or statutes, does not preclude further inquiry concerning other traditional and customary practices that have existed". Ibid (citing PASH, 79 Hawai'i at 438, 903 P.2d at 1259).
124 Ibid, at 187, 970 P.2d at 495.
125 Ibid. A kama'āina literally means "land child" and is one who is native-born and familiar with a particular place (Hawaiian Dictionary).

Finally, a defendant must show that "the exercise of the right occurred on undeveloped or less than fully developed property".[126] In clarifying and perhaps limiting *PASH*, the Court held that on property deemed "fully developed", which it characterised as property zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is always "inconsistent" to permit the practice of traditional and customary rights.[127] The Court, however, also reserved the question of the status of Native Hawaiian traditional and customary rights on property that is "less than fully developed".[128]

### E. *Ka Pa'akai O Ka 'Aina v Land Use Comm'n*.

In *Ka Pa'akai O Ka 'Aina v Land Use Commission* (2000),[129] the Hawai'i Supreme Court provided an analytical framework "to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private [property] interests".[130] This case arose from the reclassification of nearly 1,010 acres of land in the Ka'ūpūlehu ahupua'a on the island of Hawai'i from conservation to urban use by the State Land Use Commission ("LUC") upon application by defendant Ka'upulehu Developments. Ka'upulehu Developments sought to develop a luxury subdivision with upscale homes, a golf course and other amenities. Plaintiffs argued that their Native Hawaiian members' customary and traditional gathering rights would be adversely affected by the proposed development.[131]

The Hawai'i Supreme Court held that the LUC improperly delegated its obligations under Article XII, section 7, to the developer by placing a condition in the order granting reclassification requiring the developer to "preserve and protect any gathering and access rights of native Hawaiians".[132] The Court stated that the wholesale delegation of responsibility for the preservation and protection of such rights to the developer "was improper and misses the point. These issues must be addressed before the land is reclassified".[133]

The Court also held that:[134]

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126 Ibid, at 187, 970 P.2d at 495 (citing PASH, 79 Hawai'i at 450, 903 P.2d at 1271).
127 Ibid, at 186-87 and n.10, 970 P.2d at 494-95, n.10.
128 Ibid, at 187, 970 P.2d at 495 (citing PASH, 79 Hawai'i at 450, 903 P.2d at 1271).
129 94 Hawai'i 31, 7 P.3d 1068 (2000).
130 Ibid, at 46-47, 7 P.3d at 1083-84.
131 Ibid, at 34-36, 7 P.3d at 1071-73.
132 Ibid, at 50, 7 P.3d at 1087.
133 Ibid.
134 Ibid, at 35, 7 P.3d at 1072.

> the [LUC's] findings of fact and conclusions of law are insufficient to determine whether it fulfilled its obligation to preserve and protect customary and traditional rights of native Hawaiians[;] [t]he LUC, therefore, must be deemed, as a matter of law, to have failed to satisfy its statutory and constitutional obligations.

The Court held that the LUC "must – at a minimum – make specific findings and conclusions" regarding:[135]

> (1) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
>
> (2) the extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and
>
> (3) the feasible action, if any, to be taken by the [LUC] to reasonably protect native Hawaiian rights if they are found to exist.

## F. *In re Waiola o Molokai*

In a water case from the island of Moloka'i, *In re Waiola o Molokai* (2004),[136] the Hawai'i Supreme Court applied the analytical framework set out in *Ka Pa'akai*. In reviewing a decision by the State Commission on Water Resource Management (COWRM), the Court utilised *Ka Pa'akai*'s guidelines to find that COWRM had not met "its public trust obligation to protect native Hawaiians' traditional and customary gathering rights",[137] by granting a water use and well construction permit, without adequately protecting the natural resources that are customarily and traditionally gathered. The Court stated:[138]

> A substantial population of native Hawaiians on Moloka'i engages in subsistence living by fishing, diving, hunting, and gathering land and marine flora and fauna to provide food for their families. Aside from the nutritional and affordable diet, subsistence living is essential to (1) maintaining native Hawaiians' religious and spiritual relationship to the land and nearshore environment and (2) perpetuating their commitment to "malama ka aina," which mandates the protection of their natural ecosystems from desecration and deprivation of their natural freshwater resources.

135 Ibid, at 47, 7 P.3d at 1084.
136 103 Hawai'i 401, 83 P.3d 664 (2004).
137 Ibid, at 443, 83 P.3d at 706.
138 Ibid, at 439, 83 P.3d at 702.

The Court found that, like the Land Use Commission in *Ka Pa'akai*, COWRM "lacked an adequate evidentiary basis for its conclusion that [the developer's] 'applied-for uses … do not abridge or deny traditional or customary Hawaiian rights, customs, practices, or appurtenant water rights, or any other rights referred to in or protected by [Hawai'i law]'".[139] Thus, the Court vacated the decision, holding that COWRM failed to place adequate conditions on the permitted use in order to protect the natural resources that were the basis of Native Hawaiian customary and traditional fishing and ocean gathering practices.[140]

### G. *In re Kukui (Molokai) Inc.*

In a more recent case, the Hawai'i Supreme Court again reviewed a COWRM decision, this time approving a permit authorizing the use of over 1 million gallons of water per day from Well-17 on Moloka'i. The Court determined, *inter alia*, that COWRM erred because it "impermissibly shifted the burden of proving harm to those claiming a right to exercise a traditional and customary native Hawaiian practice".[141] The Court concluded that COWRM failed to adhere to the proper burden of proof standard to maintain the protection of Native Hawaiian traditional and customary gathering rights in discharging its public trust obligation.[142]

## IV. Judicially Defined Criteria for Customary and Traditional Practices

### A. *Balancing the Interests of Property Owners and Practitioners*

In reviewing customary rights claims, the Hawai'i Supreme Court has articulated a balancing test in which the retention of a Hawaiian tradition is determined first by deciding if a custom has continued in a particular area and, second, by balancing the respective interests of the practitioner and possible harm to the landowner.[143]

In *Kalipi*, the Court did not need to implement this balancing test since it found that there was insufficient evidence to show that such rights should accrue to someone who did not reside in the ahupua'a in which such rights are claimed. The Court also noted, however, that testimony had shown that

139 Ibid, at 443, 83 P.3d at 706 (quoting Conclusion of Law No. 29 entered by the State Commission on Water Resource Management in the contested case hearing decision that formed the basis for this appeal).

140 Ibid.

141 *116 Hawai'i 481, 507, 174 P.3d 320, 346* (2007).

142 Ibid, at 509, 174 P.3d at 348.

143 Kalipi, 66 Haw. at 10, 656 P.2d at 750-51 (citations omitted).

there was a range of traditional practices – including the gathering of items not included in Haw. Rev. Stat. section 7-1 and use of lands for spiritual and other purposes – that required the use of undeveloped property of others. The Court then concluded that where such practices, "*without harm to anyone*", have continued, section 1-1 ensures their continuance "so long as *no actual harm* is done thereby".[144] Thus, for the *Kalipi* Court, the balancing test focused on whether the customary practice harmed another's interest.

In *Pele*, the Court characterised *Kalipi* as upholding rights under Haw. Rev. Stat. section 1-1 to:[145]

> enter undeveloped lands owned by others to practice continuously exercised access and gathering rights necessary for subsistence, cultural or religious purposes *so long as no actual harm* was done by the practice.

Subsequently, in *PASH*, the Court amplified on the test, stating that the "*reasonable exercise* of ancient Hawaiian usage is entitled to protection under article XII, section 7", although:[146]

> the balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing *non-traditional practices or exercising otherwise valid customary rights in an unreasonable manner*.

Similarly, when the *PASH* Court reached its landmark conclusion that "the western concept of exclusivity is not universally applicable in Hawai'i",[147] it immediately attempted to alleviate fears of private property owners by stressing "the non-confrontational aspects of traditional Hawaiian culture" which "should minimize potential disturbances".[148] The Court then emphasised that "unreasonable or non-traditional uses are not permitted under today's ruling".[149]

Consequently, in balancing the interests of practitioners and private property owners, the Court has focused on (1) whether the practice is indeed customary and traditional; (2) whether the practice is exercised in a reasonable manner; and (3) whether the practice causes harm to another's recognised interest. The question of harm to another's interest is closely related to whether a customary practice is exercised in a reasonable manner.

144 Ibid, at 10, 656 P.2d at 750 (emphasis added).
145 Pele, 73 Haw. at 618, 837 P.2d at 1270 (emphasis added).
146 PASH, 79 Hawai'i at 442, 903 P.2d at 1263 (emphasis added).
147 Ibid.
148 Ibid, at 447, 903 P.2d at 1268.
149 Ibid.

In a footnote in *PASH*, the Court highlighted three aspects of the doctrine of custom in Hawai'i: (1) a custom is *consistent* when measured against other customs; (2) a custom is *certain* if it can be objectively defined and applied; and (3) *reasonableness* concerns the manner in which an otherwise valid customary right is exercised – "even if an acceptable rationale cannot be assigned, the custom is still recognised as long as there is no 'good legal reason' against it."[150] Thus, the reasonableness of the manner or method employed in the exercise of a valid practice determines whether it warrants constitutional protection, but the balance tips toward reasonableness as long as there is no good legal reason against recognising the custom.[151]

### B. *Practice Established by 25 November 1892*

Based on the enactment of Haw. Rev. Stat. section 1-1, traditional and customary practices in Hawai'i must be established in practice by 25 November 1892.[152]

### C. *Customary Rights not Limited by Tenancy*

Although *Kalipi* appeared to hold that customary and traditional rights were associated with residency within the ahupua'a, *Pele* clarified that Article XII, section 7, protects customary rights exercised beyond the boundaries of the ahupua'a in which a Native Hawaiian resides where those rights were customarily and traditionally exercised in that manner.[153] In *PASH*, the Court reaffirmed its holding in *Pele* and declared that "common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state".[154]

### D. *Definition of Native Hawaiian*

In *PASH*, the Court rejected an interpretation of *Pele* that would have limited protection under Article XII, section 7, to those Native Hawaiians of 50 per cent or more Hawaiian ancestry. The *PASH* Court held that descendants of Native Hawaiians who inhabited the islands prior to 1778 who assert valid customary and traditional Hawaiian rights are entitled to protection, regardless of their blood quantum.[155]

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150 Ibid, at 447, 903 P.2d at 1269 n.39.

151 See D Kapua'ala Sproat "Comment: The Backlash against PASH: Legislative Attempts to Restrict Native Hawaiian Rights" (1998 Summer/Fall) 20 U Haw L Rev 321 at 342.

152 PASH, 79 Hawai'i at 447, 903 P.2d at 1268.

153 Pele, 73 Haw. at 620, 837 P.2d at 1272.

154 PASH, 79 Hawai'i at 448, 903 P.2d at 1269.

155 Ibid, at 449, 903 P.2d at 1270.

### E. *Continued Existence of a Customary Practice*

Both *Kalipi* and *Pele* implied that a customary practice, in order to be valid, must have been exercised continuously.[156] Moreover, in the earlier case of *State v Zimring*,[157] the Court seemed to reject the idea that customary practices had carried over into a private property regime. *PASH* characterised the relevant language in *Zimring* as dicta and specifically stated that the "ancient usage of lands practiced by Hawaiians did, in fact, carry over into the new system of property rights" and that "fee simple title in Hawai'i is limited by the sovereign's authority to regulate its use".[158] This analysis led the Court to conclude that that the "right of each ahupua'a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site".[159]

### F. *Undeveloped/Fully Developed Land*

In the *Kalipi* case, the Hawai'i Supreme Court imposed a restriction on the exercise of traditional and customary under Haw. Rev. Stat. section 7-1, determining that such practices could only be exercised on "undeveloped lands within the ahupua'a".[160] The Court acknowledged that the undeveloped land limitation "is not, of course, found within [Haw. Rev. Stat. 7-1]".[161] The Court added the restriction to avoid conflicts between practitioners and landowners and characterised it as necessary to prevent residents from going "anywhere within the ahupua'a, including fully developed property, to gather the enumerated items".[162] Such a result, the Court said, "would so conflict with understandings of property, and potentially lead to such disruption" that it would be absurd and therefore not what was intended by the statute's framers.[163] The *Kalipi* Court also expressed its opinion that such a result would conflict with the "traditional Hawaiian way of life in which cooperation and non-interference with the well-being of other residents were integral parts of the culture".[164]

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156 Kalipi, 66 Haw. at 11-12, 656 P.2d at 751-52; Pele, 73 Haw. at 619, 837 P.2d at 1271.

157 State v Zimring, 58 Haw. 106, 566 P.2d 725 (1977). In Zimring, the Court determined that lava extensions are owned by the State and rejected the trial Court's determination that Hawaiian usage was always to give lava-extended shorelines to the abutting landowner. In doing so, the Zimring Court questioned the relevance of customary usage prior to institution of a fee simple land ownership system in Hawai'i.

158 PASH, 79 Hawai'i at 449-450, 903 P.2d at 1270-71.

159 Ibid, at 45, 903 P.2d at 1271.

160 Kalipi, 66 Haw. at 7, 656 P.2d at 749.

161 Ibid, at 8, 656 P.2d at 750.

162 Ibid.

163 Ibid.

164 Ibid.

In *Pele*, the Court did not specifically comment on this requirement, but implicitly applied it to customary practices recognised under Haw. Rev. Stat. section 1-1.[165] However, in *PASH,* the Court declined the "temptation to place undue emphasis on non-Hawaiian principles of land ownership" and elected "not to scrutinize the various gradations in property use that fall between the terms 'undeveloped' and 'fully developed'".[166] Instead, the Court emphasised the need to make determinations on a case-by-case basis. However, the *PASH* Court also stated that, "once land has reached the point of 'full development' it may be inconsistent"[167] to allow the exercise of Native Hawaiian rights. On its face, this language indicated that there could be instances in which fully developed land might be subject to the exercise of Native Hawaiian customary and traditional rights.

Subsequently, the Court clarified this statement. In the *Hanapi* case, the Court held that:[168]

> if property is deemed "fully developed," i.e., lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is *always* "inconsistent" to permit the practice of traditional and customary native Hawaiian rights on such property.

In a footnote, the Court acknowledged that residential property is only one example of fully developed property and that there may be other such examples.[169] In accordance with the holding in *PASH*, however, the Court reserved the question as to the status of Native Hawaiian rights on property that is "less than fully developed".[170]

## G. *Establishing Customary and Traditional Practices*

Of the cases decided by the Hawai'i Supreme Court, only *Hanapi* offers concrete guidance on what is required to establish a customary and traditional practice. In *Hanapi*, the Court first noted that some customary and traditional native Hawaiian rights are codified either in Article XII, section 7, of the State

165 See Pele, 73 Haw. at 621, 837 P.2d at 1273, stating that upon a showing that Wao Kele O Puna was a traditional gathering area utilised by tenants of the abutting ahupua'a, PDF members may have a right to enter the undeveloped areas to exercise their traditional practices. PDF based its customary and traditional rights claim on Haw. Rev. Stat. § 1–1 and Art. XII, § 7 of the Hawai'i Constitution. Ibid, at 618, 837 P.2d at 1270.

166 PASH, 79 Hawai'i at 450, 903 P.2d at 1271.

167 Ibid.

168 Hanapi, 89 Hawai'i at 186-87, 970 P.2d at 494-95.

169 Ibid, at 187, 970 P.2d at 495, n. 10.

170 Ibid, at 187, 970 P.2d at 495.

constitution or in Haw. Rev. Stat. sections 1-1 and 7-1.[171] The Court stated, however, "The fact that the claimed right is not specifically enumerated in the Constitution or statutes, does not preclude further inquiry concerning other traditional and customary practices that have existed."[172]

In *Hanapi*, the defendant, although testifying to his own practice and the basis for the practice, did not offer an explanation of the "history or origin of the claimed right. Nor was there a description of the 'ceremonies' involved in the healing process."[173] The Court in *Hanapi* believed that the defendants' testimony and the testimony of his wife, standing alone, were insufficient to meet the burden of proving a customary and traditional right. The Court stated that to establish the existence of a traditional or customary Native Hawaiian practice, there must be an "adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice".[174] According to the Court, such a foundation can be made through testimony of experts or kama'āina witnesses as proof of ancient Hawaiian tradition, custom and usage.[175]

What is less clear is to what extent Native Hawaiian practitioners can use modern means and methods – for instance a motorboat for fishing or a chainsaw to fell a tree – to exercise customary and traditional rights. Although the Hawai'i Supreme Court has never been called upon to decide these kinds of issues,[176] federal Court cases interpreting American Indian treaty rights may provide some guidance. Several federal Court decisions appear to support the use of modern technology while native peoples are engaged in traditional and customary practices. These decisions affirmed the right of tribes to employ

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171 Ibid, at 186, 970 P.2d at 494. Notwithstanding the Court's statement, arguably only Haw. Rev. Stat. § 7–1 actually enumerates customary and traditional rights.

172 Ibid, at 186, 970 P.2d at 494.

173 Ibid, at 187, 970 P.2d at 495.

174 Ibid.

175 Ibid, at n.12.

176 One state trial Court judge determined, with respect to a claim of customary and traditional fishing rights, that:

> Method is relevant to claimed traditional and customary rights. Fishing and gathering lose their traditional and customary nature when performed with modern technology that: (a) substantially replaces human dexterity, energy or propulsion (e.g. manual harvesting, hand retrieval of lines and nets, swimming, rowing) or natural energy or propulsion (e.g. surfing, sailing) with engines or motors; or (b) replaces and substantially extends the scope or intensity of traditional methods (e.g. miles long synthetic lines vs. traditionally made lines). A difference in amount can be a difference in kind.

*Kelly v 1250 Oceanside Partners* (Civ. No. 00-1-0192K, Findings of Fact; Conclusions of Law and Order With Respect to Counts II and V in the Fifth Amended Complaint, October 21, 2002), Conclusion of Law No. 4.

modern boats, nets and other techniques while exercising their treaty fishing rights.[177] For example, *United States v Washington*[178] discussed the fact that the treaty tribes utilise modern techniques to fish and some, such as the Makah, even desired assurances in negotiating their treaties that they would not be bound to aboriginal techniques and methods in fishing. Ultimately, the Court determined that the "treaty tribes may utilize improvements in traditional fishing techniques, methods and gear subject only to restrictions necessary to preserve and maintain the resource".[179]

Similarly, there are federal statutes, including the Marine Mammal Protection Act of 1972,[180] which provide specific exemptions for Alaska Natives, allowing them to take protected marine mammals such as seals, whales, and sea otters for subsistence or for use in traditional native handicrafts. These statutes as well as cases interpreting them may provide some guidance on this issue.[181] The answer, however, is likely to lie in a case-by-case determination by Hawai'i Courts as to whether the particular means or method employed is reasonable and whether its use is harmful to another's interest.

Hawaiian scholar Davianna Pomaika'i McGregor, who has extensively studied traditional and customary practices in rural communities, has suggested some behavioural factors that should be considered in determining whether practices, in this modern age, are firmly linked to custom. She states:[182]

> These rules of behaviour are tied to cultural beliefs and values regarding the respect of the *'āina* (land), the virtue of sharing and not taking too much, and a wholistic perspective of organisms and ecosystems that emphasises balance and coexistence.

She also notes:[183]

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177 United States v Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 414 U.S. 44, 48 (1976). See also Puyallup Tribe v Department of Game, 391 U.S. 392 (1968); Sohappy v Smith, 302 F. Supp. 899 (D. Or. 1969), aff'd. and remanded, 529 F.2d 570 (9th Cir. 1976); United States v Michigan, 471 F. Supp. 192, 260 (W.D. Mich. 1979); Peterson v Christensen, 455 F. Supp. 1095, 1099 (E.D. Wis. 1978); Grand Traverse Band of Chippewa and Ottawa Indians v Director, Michigan Department of Natural Resources, 971 F. Supp. 282, 289 (W.D. Mich. 1995), aff'd. 141 F.3d 635 (6th Cir. 1998), rehrg denied, 1998 U.S. App. LEXIS 13638 (1998), cert. denied, 525 U.S. 1040 (1998).

178 U.S. v Washington, 384 F. Supp. 312, 363-64 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

179 Ibid, at 402.

180 16 U.S.C. § 1361-1421h (2000).

181 Ibid, § 1371(b).

182 McGregor, above note 3, 30 Hawn. J. of Hist. at 16 (1996).

183 Ibid, at 16.

> In communities where traditional Hawaiian customs and practices have continued to be practiced, the ‘ohana respects and cares for the surrounding natural resources. They only use and take what is needed. They allow the natural resources to reproduce. They share what is gathered with family and neighbors.

Other factors include: protecting the knowledge that has been passed down from generation to generation; acting with purpose and mindfulness when engaged in the particular activity; respecting the traditional areas of other families and practitioners; and honouring the gods and deities that guard a particular resource.[184]

### H. *Impact on Private Property Interests*

In *PASH*, the Hawai‘i Supreme Court rejected the developer’s argument that the recognition of traditional Hawaiian rights beyond those established in *Kalipi* and *Pele* would fundamentally alter its property rights and result in a judicial taking.[185] The Court summarily disposed of the argument, noting that a judicial decision constitutes an unconstitutional taking of private property if it “involve[s] retroactive alteration of state law such as would constitute an unconstitutional taking of private property”[186] and stating that the argument placed undue reliance on Western understandings of property law “not universally applicable in Hawai‘i”.[187] The Court also stated that custom and usage have always been part of the State’s laws.[188]

The *PASH* Court then turned to the question of whether a “regulatory taking” – a taking that occurs when government application of a law to a particular landowner denies all economically beneficial use of the property without compensation – might result from recognition of traditional and customary rights during the process of obtaining permits to develop land.[189] The *PASH* Court agreed with the developer that the issue was premature since it was impossible to know, at that stage of the case, whether and what types of conditions might be placed by the regulatory agency on development in order to protect customary and traditional rights.[190]

184 Ibid, at 16-18.
185 PASH, 79 Hawai‘i at 451, 903 P.2d at 1272.
186 Ibid (citing Bonelli Cattle Co. v Arizona, 414 U.S. 313, 337 n.2, 38 L. Ed. 2d 526, 94 S. Ct. 517 (1973) (Stewart J, dissenting)).
187 Ibid.
188 Ibid.
189 Ibid, at 452, 903 P.2d at 1273.
190 Ibid.

Although the *PASH* case has been criticised as a radical departure from prior Hawai'i law, because of the ripeness doctrine,[191] it can only be challenged in federal Court once it has been applied in a specific factual situation. As one commentator has noted,[192]

> [u]ntil there is some specific permit condition imposed or some denial of a permit based on PASH, or until some specific claimant's individual demand for access is adjudicated, there will likely be reluctance on the part of the U.S. Supreme Court to become involved.

Since the *PASH* decision, few cases have made their way to the Hawai'i Supreme Court relating to customary and traditional rights – *Ka Pa'akai* and *Waiola* specifically deal with the permitting process and neither one has resulted in a federal Court challenge to the Court's customary rights jurisprudence.[193]

Soon after the Hawai'i Supreme Court's decision in *PASH*, calls came from the business and private-property rights sectors of the community to define and regulate customary and traditional rights.[194] In 1997, bills were introduced in the Hawai'i State Legislature that would have regulated customary and traditional rights.[195] Senate Bill 8, for instance, instituted a process of determining and registering all traditional and customary uses exercised on a parcel of land. House Bill 1920, on the other hand, created a declaratory cause of action that could be initiated in circuit Court to "determine the nature and extent of customary and traditional practices in land". Both bills failed, due in large part to opposition from the Native Hawaiian community.

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191 See Paul M Sullivan "Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i" (1998 Summer/Fall) 20 U Haw L Rev 99 at 126-33 for a discussion of federal Court cases in which the argument has been made that the Hawai'i Supreme Courts' decisions in specific cases resulted in judicial taking of property and the resulting federal decisions finding such claims not ripe for review.

192 Ibid, at 161.

193 See M Casey Jarman and Robert RM Verchick, "Beyond the 'Courts of the Conqueror': Balancing Private and Cultural Property Rights under Hawai'i Law" (2003, Spring) 5 Scholar 201 for a discussion of the Ka Pa'akai case on remand to the Land Use Commission and application of the Ka Pa'akai analysis in other proceedings.

194 See, for example, Kenneth R Kupchak "Native-Use Rights to Affect Permits" Pacific Business News (Hawai'i, 16 April 1996) calling for a comprehensive solution and the creation of a Native Rights Commission to determine such rights.

195 See D Kapua'ala Sproat, above note 151, (Summer/Fall 1998) 20 U Haw L Rev at 353 for a description of these legislative efforts and analysis of the bills in relation to the Hawai'i Supreme Court's decisions.

One outcome of these legislative efforts, however, was the establishment of a PASH-Kohanaiki Study Group,[196] which released a report on its deliberations in January 1998. The report surveyed the issues raised by the *PASH* decision from various perspectives including those of landowners/business interests, Native Hawaiian practitioners and government agencies. The landowner/business perspective was that a resolution was needed that would (1) protect and perpetuate traditional rights without diminishing private property owner rights, (2) provide predictability, certainty and finality, and (3) foster stewardship of the land.[197] Specific concerns noted were the impact of the decision on title insurance and development financing, the possible increased regulatory burden on those wishing to develop properties, and the potential liability of landowners for injury to those accessing private property to practise customary and traditional rights. An overarching concern expressed was that the PASH decision had the potential to "undermine the State's investment climate" with resulting negative consequences throughout the State's economy. More than 15 years after the *PASH* decision, however, it does not appear that the concerns and fears expressed by business and private property rights advocates have actually affected real estate transactions or Hawai'i's economy.

## V. Custom in Other State Laws

Although it is not possible to do a complete survey of other Hawai'i laws incorporating or protecting Hawaiian custom, several important examples indicate the extent to which custom plays a role in Hawai'i law. These examples include water rights, the protection of Hawaiian human remains or iwi kūpuna, and enactment of a law allowing parents to keep the 'iewe or placenta of a newborn.

### A. *Hawaiian Water Rights*[198]

In ancient Hawai'i, water or wai was a procreative force and the physical embodiment of the god Kāne.[199] In addition to defining social and cultural development because of the importance of water to the growth of kalo or taro, the Hawaiian staple plant, how water was shared and managed was literally the basis for law. For growth and to prevent disease, kalo requires constantly

196 See H.R. No. 197, H.D. 1, Regular Session of 1997, Nineteenth State Legislature, State of Hawai'i.

197 PASH-Kohanaiki Study Group Report at 9 (January 1998).

198 For an extended discussion of Hawaiian water rights law see John Castle and Alan Murakami in Melody Kapilialoha MacKenzie (ed) Native Hawaiian Rights Handbook (University of Hawai'i Press, Honolulu, 1991) Chapter 7 ["Handbook"].

199 ES Craighill Handy and Elizabeth Green Handy, Native Planters in Old Hawaii (Bishop Museum Press, Honolulu, 1972) at 64-65.

flowing cool, fresh water. Hawaiians constructed complex systems of 'auwai or irrigation ditches and developed a management system that apportioned water among lo'i kalo or taro fields next to a ditch or stream.[200] After water flowed through the lo'i, it was returned to the 'auwai or stream to flow downstream to the next lo'i and eventually to the sea. On the lo'i banks, kalo farmers grew other crops like banana, sugar cane and yam.[201] This system, which served the ancient Hawaiians well, continues today in rural communities throughout the islands. Kalo is still a staple food for the Hawaiian community and indeed, in the Hawaiian creation story, kalo and Hawaiians share a common ancestor.[202] Thus, kalo is viewed as the older sibling of the Hawaiian people. Kānāwai (relating to water) is the word for law in the Hawaiian language and, as commentators have noted, this term reflects Hawaiian society's[203]

> focus on managing the shared use of water. Hawaiians deemed water and other natural resources a public good. The entire community, regardless of social rank, dutifully respected this principle and did not lightly suffer any violaters.

Hawai'i water law today is a mix of Hawaiian traditional concepts, common law based on those concepts, and constitutional and statutory provisions incorporating those concepts. While it is beyond the scope of this article to examine Hawai'i water law in detail, several general principles – appurtenant water rights, riparian uses, and the public trust nature of water – show the extent to which Hawaiian tradition has been incorporated into State law. In addition, the Hawai'i Water Code contains specific provisions protecting traditional and customary rights.

Early Hawai'i case law recognised appurtenant water rights based on the ancient Hawaiian agricultural system. Through ancient custom, the right to use water for irrigating taro lands became attached or "appurtenant" to the lands. This customary right became a legal right when land titles were awarded[204] with the quantity of water allowed tied to the amount customarily used at and immediately prior to a land award during the Māhele process.[205] The earliest Hawai'i water rights case established this principle. In *Peck v Bailey* (1867),[206]

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200 See Antonio Perry "Hawaiian Water Rights" in Thomas G Thrum (ed) Hawaiian Annual & Almanac for 1913 (1912) at 95 for a description of traditional Hawaiian water usage and management.

201 Handy and Handy, above note 199, at 92-93 (1972).

202 David Malo, Hawaiian Antiquities (Bishop Museum Press, Honolulu, 1903) at 320.

203 D Kapua'ala Sproat and Isaac H Moriwake "Ke Kalo Pa'a o Waiāhole: Use of the Public Trust as a Tool for Environmental Advocacy" in C Rechtschaffen and D Antolini (eds) Creative Common Law Strategies for Protecting the Environment (Environment Law Institute, Washington, 2007) at 249.

204 Peck v Bailey, 8 Haw. 658, 661 (1867).

205 Carter v Territory, 24 Haw. 47, 66 (1917); Territory v Gay, 31 Haw. 376, 383 (1930).

206 8 Haw. 658 (1867).

a dispute arose between two landowners within the ahupua‘a of Wailuku on Maui, with the plaintiff claiming a superior right based on title derived from the konohiki of the ahupua‘a.[207] The Court rejected the claim, stating, “[i]f any of the lands were entitled to water by immemorial usage, this right was included in the conveyance as an appurtenance”.[208] Consequently, each party was limited to ancient appurtenant rights to use water for its lands, neither party having any superior rights. Since the *Peck* decision, the doctrine of appurtenant rights has become a basic tenet of Hawai‘i water law.[209]

In *McBryde Sugar Co. v Robinson*,[210] the Hawai‘i Supreme Court clarified Hawai‘i law to hold that waters flowing in natural watercourses belong to the State of Hawai‘i. In *McBryde*, the Court looked to the Māhele and its implementing laws to examine what Kamehameha III intended to convey in granting fee simple titles. The Board of Land Commissioners, which was responsible for hearing and determining land claims, adopted certain principles including the principle that the king’s prerogatives as head of the nation – his “sovereign prerogatives – could not be conveyed. One of these sovereign prerogatives was “to encourage and even to enforce the usufruct of lands for the common good”.[211] The *McBryde* Court reasoned that the right to use water was one of the most important usufructs of land. The principles showed the king’s intent to reserve the right to use water to himself as sovereign for the common good. Thus, no right to private ownership of water had been conveyed with any land title grant as a result of the Māhele process.[212] The Court held that the State, as successor to the King, owned all waters flowing in natural watercourses.

In *McBryde*, the Court also pointed to section 7 of the Kuleana Act of 1850, which guarantees the right to “drinking water and running water”. The Court said that the term “running water” must have meant water flowing in natural watercourses, since artificial watercourses were exempted from the statute. Pointing to the influence of the missionaries from Massachusetts, the Court

207 Ibid, at 659.

208 Ibid, at 661.

209 Wells A Hutchins The Hawaiian System of Water Rights (US Dept of Agriculture and the Board of Water Supply, City and County of Honolulu, Honolulu, 1946) at 103.

210 54 Haw. 174, *504 P.2d 1330 (1975), affm’d on rehearing*.

211 Ibid, at 186, 504 P.2d at 1338, quoting from 2 Revised Laws of Hawaii, 1925 app. at 2124, 2128 (1925).

212 Ibid, at 187, 504 P.2d at 1339.

found parallels to the English common law doctrine of riparianism, which Massachusetts had adopted.[213] Consequently, the Court held that a landowner adjoining a natural watercourse had riparian water rights.

Subsequently, the Hawai'i Supreme Court in *Reppun v Board of Water Supply*[214] reaffirmed the doctrine, specifically highlighting the needs of Hawaiian kalo farmers and the shared use of water resources in traditional Hawaiian society:[215]

> First, the doctrine is consistent with the needs of native commoners at the time of the law's passage. Taro, the predominant agricultural crop, grew best where a steady flow of running water, most of which could be subsequently utilised by lower riparian users, occurred; the cultivation of taro took place principally upon riparian lands; and grants to commoners were restricted to lands they had in fact cultivated. Second, the principles underlying the doctrine are consistent with those that appear to pervade the native system of water allocation and preexisting civil law inasmuch as: "title" to the water was not equated with the right to use; each person's right to use was a "correlative" nature; and rights to use were predicated upon beneficial application of the water to the land.

In 1978, the Hawai'i State Constitution was amended to expressly declare that "[a]ll public natural resources are held in trust by the State for the benefit of its people".[216] Another amendment reiterated the State's "obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people".[217] This amendment also provided for the creation of a water resources agency that would, among other things, "establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources".[218]

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213 The cases cited by the Court indicated that natural water courses were publici juris; meaning that such waters were public and common to the extent that all who had a right of access could make reasonable use of them. Ibid, at 186-87, 504 P.2d at 1338-1339.

214 65 Haw. 531, 656 P.2d 57 (1982), cert. denied, 471 U.S. 1014 (1984).

215 Ibid, at 545, 656 P.2d at 67 (1982).

216 Haw. Const. art. XI, § 1.

217 Haw. Const. art. XI, § 7.

218 Ibid.

In 1987, the State Legislature adopted the State Water Code. The Code ensures that "traditional and customary rights of ahupua'a tenants … shall not be abridged or denied" in implementing its provisions and states that:[219]

> such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, o'opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.

In a landmark water rights decision interpreting the State Constitution and the Water Code, the Hawai'i Supreme Court gave substance to the public trust doctrine in Hawai'i.[220] Although the decision contains many significant and groundbreaking determinations, for our purposes, the most relevant is the Court's recognition that "Native Hawaiian and traditional and customary rights" are public trust purposes.[221]

### B. *Protection of Ancestral Remains*[222]

Values and customs related to death "are deeply ingrained in Hawaiian culture, calling for utmost respect and reverence".[223] For traditional Hawaiians, the bones and the spirit of a person are connected and the spirit remains near the bones or iwi following death. The burial area is a sacred place, particularly because the life force or mana of the deceased person is infused into the place of burial. The mana of the deceased is imparted to the ahupua'a and eventually to the entire island. The iwi of the deceased and the burial site were so sacred that if either was disturbed, the ability of the spirit to join the 'aumākua or ancestors in eternity was in jeopardy. This then could result in injury and spiritual trauma to the living descendants of the deceased person.

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219 Haw. Rev. Stat. § 174C-101(c). Hīhīwai are "endemic grainy snails" eaten by Native Hawaiians; 'ōpae is the "general name shrimp"; 'o'opu is the "general name for certain families of fish … some in salt water near the shore, others in fresh water, and some said to be in either fresh or salt water"; limu is a "general name for all kinds of plants living under water, both fresh and salt, also algae growing in any damp place in the air, as on the ground, on rocks, and on other plants"; aho means "line, cord, lashing" (Hawaiian Dictionary). Section 174C-101(d) also provides that the "appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter."

220 See, generally, Sproat and Moriwake, above note 203, for a discussion of the public trust doctrine in Hawai'i water cases.

221 In re Water Use Permit Applications, 94 Haw. 97, 137 n.34, 9 P.3d 409, 449 n.34 (2000).

222 This section is based on information from Chapter 13 in Handbook, above note 198, written by Edward Halealoha Ayau.

223 Ibid, at 245. See MK Pukui, EW Haerting, C Lee Nānā I Ke Kumu (Look to the Source) Vol. I (Hui Hanai, Honolulu, 1972) at 115-118, 195-196 for discussion of Hawaiian concepts of death and treatment of human remains.

In 1988, during the construction of a large resort on the island of Maui near Honokahua Bay, Hawaiian remains were removed to make room for the new hotel. Although there certainly had been other instances where remains had been discovered, in the past, iwi kūpuna or ancestral remains had been dug up and historic sites paved over for development with impunity. At Honokahua, however, when local news accounts began to report the exhumation of more than 1,100 skeletal remains, Hawaiians were outraged by the desecration.[224] They mobilised and held a 24-hour vigil at the state capitol. Ultimately, the developer agreed to move the hotel inland, the disturbed 'iwi kūpuna were reinterred, and the burial area was set apart.[225]

The activities at Honokahua sparked a demand for legislative protection for Hawaiian burial sites. In 1990, the Hawai'i State legislature passed a burials law giving Hawaiian burial sites – especially those with large numbers of remains – additional protection.[226] The law establishes island burial councils for each of the major islands, with representatives from both the Native Hawaiian community and large landowner interests, with Hawaiian interests constituting a majority on the councils.[227] The councils assist the State Historic Preservation Division (SHPD) with the inventory and identification of unmarked prehistoric and historic Hawaiian burial sites. The councils also make recommendations on the treatment and protection of iwi kūpuna.

A major role of the councils is to "determine the preservation or relocation of previously identified native Hawaiian burial sites".[228] The law states that "[a]ll burial sites are significant and shall be preserved in place until compliance with this section is met…".[229] The law also establishes criteria that the councils must consider, including giving higher priority to in situ preservation to[230]

> areas with a concentration of skeletal remains, or prehistoric or historic burials associated with important individuals and events, or that are within a context of historic properties, or have known lineal descendants[.]

Before a State project affecting unmarked prehistoric or historic Hawaiian burials begins, SHPD must be notified for review and comment. Similarly, for projects located on private property, before any agency of the State or its political subdivisions approves a project involving a permit, licence, land

224 Handbook, above note 198, at 245.
225 Kūnani Nihipali "Stone by Stone, Bone by Bone: Rebuilding the Hawaiian Nation in the Illusion of Reality" (2002, Spring) 34 Ariz St LJ 27.
226 Act 306, Haw. Sess. Laws. 1990 (codified at Haw. Rev. Stat. Chap. 6-E).
227 Haw. Rev. Stat. § 6E-43.5.
228 Ibid, § 6E-43.5(f)(1).
229 Ibid, § 6E-43(b).
230 Ibid.

use change or other entitlement for a use that may affect burials, the agency must advise SHPD.[231] If an archaeological inventory survey reveals evidence of burials on the relevant property, the appropriate island burial council has jurisdiction to determine whether to preserve in place or relocate the remains.

If Hawaiian remains are "inadvertently" discovered during construction, SHPD has jurisdiction to decide whether to preserve in situ or relocate; in making that decision, SHPD must use the same criteria as the councils.[232] In either instance, a mitigation plan will be developed by the SHPD or with its concurrence. Preservation in place should be the mitigation plan if there is no threat to the iwi. The landowner or developer is usually responsible for executing the mitigation plan.[233]

On the other hand, if removal is necessary due to imminent harm to the iwi, burial council members are notified and allowed to oversee the process. SHPD determines the place of relocation after consulting with the property owner, lineal descendants and the council. Lineal and cultural descendants may perform traditional ceremonies during relocation of the iwi.[234]

The burials law defines "burial site" to address concerns that human remains should not be classified as ordinary property and that the area surrounding a burial is sacred.[235] Thus, burial sites are "unique class[es] of historic property". Moreover, under the law, the State of Hawai'i holds title to known Hawaiian burial sites "in trust for preservation or disposition by … [Native Hawaiian] descendants".[236] Finally, the State cannot transfer a burial site without consulting the appropriate island burial council.[237]

The success of the burial law depends on how well SHPD implements the law and whether all parties – particularly developers and landowners – cooperate. Indeed, with the large number of development activities in Hawai'i, the law can only be successful if developers and landowners are responsive to the complex cultural, spiritual and legal issues involved. Recent controversies – in urban Honolulu and on the island of Kaua'i – indicate that the process envisioned by the law may not be working. Several lawsuits are currently pending in State Courts dealing with the interpretation of the law in an urban setting where permits have been granted for development, allegedly without

231 Ibid, § 6E-42.
232 Ibid, § 6E-43.6(c)(3).
233 Ibid, § 6E-43.6(e).
234 Ibid, § 6E-43.6(f).
235 Ibid, § 6E-2.
236 Ibid, § 6E-7(c).
237 Ibid, § 6E-7(d).

following the careful review process established in the law.[238] This means, for instance, that in one case where remains of over 60 kūpuna have been discovered, they are classified as "inadvertently discovered" and jurisdiction over whether to preserve in place or remove to another location has fallen to the SHPD rather than the O'ahu Island Burials Council.[239]

### C. *Protection for Customs Related to Birth*

Just as customary practices related to death are culturally and spiritually significant to Native Hawaiians, so too are those relating to birth. The proper care of both the piko or umbilical cord, and 'iewe or placenta, of a newborn increases the child's health and well-being throughout its life. Important rituals associated with both the piko and 'iewe connected a child to its homeland. The piko would be carefully guarded and then placed in a special reserved place. Hawaiian scholar Mary Kawena Pukui stated,[240]

> In every district on every island were places, usually stones, especially reserved for the *piko*. *Wailoa* was one on the Big Island … another was *Mokuola*. *Ola* means 'life' and *loa* means 'long'. Mothers took the cords to stones with names like these so their babies would live long, healthy lives.

Traditionally, Hawaiians cleaned the 'iewe of blood to ensure that the child's eyes would not be weak or sore. The 'iewe was later buried, usually under a tree, to keep the child connected to its home and to prevent the child's spirit from wandering homeless or hungry after death.[241]

In 2005, the State of Hawai'i Department of Health began enforcing a policy that classified the 'iewe as infectious waste. Previously, hospitals and doctors had given the 'iewe to a mother upon request. A Native Hawaiian couple filed a lawsuit in the US District Court for the District of Hawai'i contesting the policy as a violation the US Constitution's provision guaranteeing religious

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238 See, for example, Kaleikini v Thielen, 124 Hawai'i 1, 237 P.3d 1067 (2010); Vicki Viotti "Wal-Mart Asked to Delay Store Opening" Honolulu Advertiser (Hawai'i, 3 October 2004) <http://the.honoluluadvertiser.com/article/2004/Oct/03/ln/ln15a.html> (last visited 5 November 2011); see Charles Kauluwehi Maxwell "Kūkākūkā: Apply the Law to Protect Naue iwi kūpuna" Ka Wai Ola o OHA (Hawai'i, June 2009) <www.oha.org/kwo/loa/2009/06/story13.php> (last visited 5 November 2011) for discussion of a recent controversy on Kaua'i.

239 For a discussion on the Hawai'i burials law and controversies surrounding its implementation in urban Honolulu, see Rona Bolante "Bones of Contention" Honolulu Magazine (Hawai'i, November 2007) <www.honolulumagazine.com/Honolulu-Magazine/November-2007/Bones-of-Contention/> (last visited 5 November 2011).

240 *Nānā I Ke Kumu* Vol. I, above note 223, at 184.

241 Ibid.

freedom and of Hawaiian traditional and customary practices.[242] Once the mother had given birth, the federal Court ordered the ʻiewe to be frozen and stored while the suit was pending. Subsequently, the ʻiewe disappeared from the hospital and the Court dismissed the lawsuit.[243]

Native Hawaiian families then sought relief through the State Legislature and, in 2006, the Legislature passed and Governor signed a law that allows a hospital to release the ʻiewe to the mother or her designee after a negative finding of infectious or hazardous disease.[244] A draft of the bill stated that "the State has the obligation to assure that religious and cultural beliefs and practices are not impeded" without a strong reason.[245] The final committee reviewing the bill noted that "the rich ethnic and cultural practices of Native Hawaiian traditions are essential to sustaining the Hawaiian culture, and need protection".[246] According to news reports, no other US state has laws addressing the cultural need to take placentas from hospitals.[247]

## VI. Conclusion – An Oli Aloha

In Hawaiʻi, state law encourages legislators, judges and policy-makers to apply the "Aloha Spirit" by providing:[248]

> In exercising their power on behalf of the people and in fulfillment of their responsibilities, obligations and service to the people, the legislature, governor, lieutenant governor, executive officers of each department, the chief justice, associate justices, and judges of the appellate, circuit, and district Courts may contemplate and reside with the life force and give consideration to the "Aloha Spirit."

242 *N.S. and E.K.N. v State of Hawai'i*, U.S. D. Ct. for the District of Hawaii, Civ. No. 05-00405 HG, Complaint (24 June 2005).

243 Ibid, Minute Order (5 August 2005).

244 Act 12, Haw. Sess. Laws (2006).

245 Twenty-Third Legislature, State of Hawaiʻi, H.B. No. 2057 (20 January 2006).

246 Twenty-Third Legislature, State of Hawaiʻi, Senate Comm. on Health, Standing Comm. Report No. 3185 on H.B. No. 2057, H.D. 2 (31 March 2006). The Committee also noted that many other ethnic groups in Hawaiʻi, including Filipinos, Chinese and Japanese, also have practices that require burial of the placenta to protect the health of the child.

247 Tara Godvin "Hawaiians Await Bill on Access to Placenta" Honolulu Star-Bulletin (Hawaiʻi, 17 April 2006) <http://starbulletin.com/2006/04/17/news/story01.html> (last visited 5 November 2011).

248 Haw. Rev. Stat. § 5.75(b) (2008).

Recognising that the aloha spirit was "the working philosophy of native Hawaiians" which was presented as a gift to the general community, Hawai'i law defines aloha as "mutual regard and affection" with "no obligation in return" and "the essence of relationships in which each person is important to every other person for collective existence".[249]

The *PASH* Court specifically cited this provision in rejecting an approach reflecting an "unjustifiable lack of respect for gathering activities as an acceptable cultural usage in pre-modern Hawai'i, which can also be successfully incorporated in the context of our current culture".[250] Subsequently, the Hawai'i State Legislature, in enacting a law that broadened the requirements of an environmental impact statement to include impacts on the cultural practices of the community, recognised that "the native Hawaiian culture plays a vital role" in the preservation of the "aloha spirit" and that:[251]

> the past failure to require native Hawaiian cultural impact assessments has resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture.

Hawai'i's unique history and culture have resulted in a modern society renowned for its warmth and generosity of spirit. That spirit finds its roots in traditional Hawaiian culture and it continues to infuse island life today, in part because of Hawai'i's long-standing recognition and protection for Hawaiian tradition and custom. Thus, I close this paper with the words from the Oli Aloha as expressed in Hawai'i state law:[252]

> Akahai, meaning kindness to be expressed with tenderness;
> Lōkahi, meaning unity, to be expressed with harmony;
> 'Olu'olu, meaning agreeable, to be expressed with pleasantness;
> Ha'aha'a, meaning humility, to be expressed with modesty;
> Ahonui, meaning patience, to be expressed with perseverance.

'Ano 'ai, 'ano 'ai, me ke aloha. Aloha ē, aloha ē, aloha ē.

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249 Haw. Rev. Stat. § 5.75(a) (2008). The law incorporates the words to an Oli Aloha, or chant of Aloha, composed by Pilahi Paki, a Hawaiian chanter, composer and writer. The oli assigns important Hawaiian cultural values to each of the letters of Aloha.

250 PASH, 79 Hawai'i at 450, 903 P.2d at 1271, n. 44.

251 Act 50, Haw. Sess. Laws (2000); see Ka Pa'akai, 94 Hawai'i at 47, 7 P.3d at 1084, n. 28 (2000).

252 Haw. Rev. Stat. § 5.75(a) (2008).

# Custom and the Formation of Tribal Authorities

The Hon Justice Sir Edward Taihakurei Durie

## I. Custom and Tribal Governance

It is interesting to reflect on how Pacific custom law reflects a particular social structure of small, autonomous communities generally unburdened by external controls or manorial rights. Instead of the sanctions, rules and principles of an imposed law, one finds an internalised value system with notions of ideal conduct, personal honour, respect for others, inclusiveness, kinship and other bonds for maintaining relationships, shared spiritual beliefs and the priority given to the interests of the community.

It is also interesting to reflect that shared values, ethics and beliefs, and close relationships and trust between community members, are seen as desirable ingredients for a sound civil society; and sound civil societies are seen as necessary for the effective operation of the state.[1]

I wish to discuss proposals to provide an infrastructure to support Māori tribal and urban communities, having regard to the values described and bearing in mind their capacity to deliver services for the benefit of both government and the affected people. The proposals were set out in a draft bill for Māori corporations, or waka umanga.[2] The corporations referred to here are like municipal corporations which manage not just commercial business but also the affairs of a community.

1 J Coleman "Social Capital in the Creation of Human Capital" (1998) 94 *American Journal of Sociology* S95; RD Putnam "The Prosperous Community; Social Capital and Public Life" (1993, Spring) 13 *The American Prospect*, 35; F Fukuyama *Trust: The Social Virtues and the Creation of Prosperity* (The Free Press, New York, 1995).

2 A waka umanga is a vessel for an enterprise or undertaking, here used as an equivalent for Māori corporations. The bill discussed in this paper was introduced into the House of Representatives on 21 November 2007 and referred to the Māori Affairs Select Committee 11 December. It was reported back on 8 September 2008 but did not receive further parliamentary consideration; it was discharged on 23 December 2009 (http://legislation.govt.nz/bill/government/2007/0175/24.0/DLM1593863.html).

## A. *Purposes and vision*

To date, general legislation for tribes has not been successfully maintained.[3] We have inherited a history of conflict rather than co-operation between Governors and tribes, an opinion that tribes are a threat to state sovereignty or to the incorporation of Māori into settler society. The proposals for tribal entities today, however, arise from the need for legal entities to manage the assets given in settlement of historic tribal claims.[4] The need for entities for Māori urban communities arises from the accumulation of group assets by those communities, particularly from contracts for the delivery of government services. Tribal entities are proposed to engage in a range of activities including:

- business ventures;
- representing the tribe to central and local government or private interests;
- providing services in health, housing, education, law and cultural maintenance; and
- promoting tribal judicial systems.

Generally, however, at least among Māori leaders, a primary concern is to maintain the customary value system. This is not only for sentimental reasons. The Tū Tangata programmes of the Department of Māori Affairs and other initiatives from the early 1980s have proven that programmes for Māori in community-building, service delivery, law observance, health, housing, land management and education have worked best when customary values have been proselytised and upheld as the font of strength and pride.

This experience suggests there could be advantages for Pacific states as well, in utilising traditional infrastructures and voluntary, community participation. Among other things, the strengthening of customary processes, to conform to human rights, could provide a cost-efficient alternative to the totally centralised legal systems that burden Western states.

The waka umanga proposals sought to give legal backing to customary institutions and norms. They stemmed from reports on Māori custom and Māori settlement entities developed by the New Zealand Law Commission substantially through the efforts of persons serving on the Mātāhauariki

3 The Councils established under the Maori Councils Act 1900 were under-resourced and the Runanga Iwi Act 1990 was repealed a year after it was enacted. There were a number of private statutes creating trusts for specified tribes.

4 The claims referred to are claims under the Treaty of Waitangi Act 1975, commonly called "Treaty claims".

Advisory Panel, Justices Baragwanath and Heath, lawyers Denese Henare and Professor Richard Sutton and social anthropologist, Dame Joan Metge. Helen Aikman QC and I were involved in the final report on waka umanga.

## II. Waka Umanga

### A. *Waka umanga are purpose-built*

The Commission's opening consideration was that legally mandated corporate entities representing tribes provide certainty for the tribes and for those wishing to deal with them, and protect the tribal leaders involved from personal liability. The Commission's further view was that the existing legal structures of companies, trusts and incorporated societies were inadequate. Each was designed for specific problems, none of which had anything to do with tribes. And so the Commission developed the concept of waka umanga as purpose-built statutory entities with corporate personality and perpetual succession, not unlike municipal corporations.

### B. *Waka umanga would not replace the tribe*

But what would this do to the customary dynamic? Would it mean a takeover by commercial and legal technocrats? It was plainly important that the customary dynamic should not be affected, and to that end, it had to be made clear that the tribe itself would not be "corporatised". Accordingly, waka umanga were structured as bodies to *represent* the tribes, not to replace them; and subject to their charters to serve as servants of the tribes and not as the tribes' controller. Their charters must reflect a *tribal* vision, not just a *business* ethic. They must answer to tribal hui and follow policy directions set by the people themselves.

### C. *Cultural match*

Their structures must also be culturally compliant. Harvard University studies contend that Native American tribal authorities do best when there is a good match between the organisation's structure and the tribal culture.[5] For example, scales of economy usually compel several clans or hapū to combine under one corporate structure. In that event it is important that the combinations match the descent group compacts of tradition. Similarly, federal structures may be

5 See for example Stephen Cornell *Five Myths, Three Partial Truths, A Robust Finding and Two Tasks* (Project Report Series, Harvard Project on American Indian Economic Development, John F Kennedy School of Government, Harvard University, 1994). See also Stephen Cornell, Miriam Jorgensen and Joseph P Kalt *The First Nations Governance Act: Implications of Research Findings from the United States and Canada* (Native Nations Institute, Udall Centre for Studies in Public Policy, The University of Arizona, Tuscon, 2002).

needed to adequately respect the autonomy of the primary unit of traditional society, the many local hapū; and distribution policies may be needed to resist the un-traditional tendency to centralism. Accordingly, the Commission took the view that waka umanga should not only fit with tradition, but they must be effective in supporting it.

### D. *Independence from government in formation*

Although it is probably not relevant to the Pacific generally, I should add that a major factor in the Commission's thinking was that Māori tribal structures were in fact being shaped by government policies for the settlement of claims. That was plainly contrary to sound principle. The Law Commission said so long ago.[6] In June 2007 the Waitangi Tribunal found the same.[7] But, unfortunately, what is not so well known is that the draft Waka Umanga Bill, with which many Māori had been involved, proposed a solution.

### E. *Women, corruption and good governance*

In other respects waka umanga could and should promote change. For example, something needs to be done, and can now be done, to promote gender equity, to uphold democracy and to stamp out corruption, bullying and the manufacture of convenient cultural inventions. I would argue that custom is dynamic and able to change, that it has changed enormously in fact, and that most changes have in fact strengthened the customary system. I would argue that change is valid so long as the primary values, of whanaungatanga and the like, are adhered to, and so long as the changes are eventually accepted by the affected communities. I would further contend, notwithstanding some controversy, that the changes wrought by modern history have been, for the most part, beneficial, helping to preserve custom law rather than weaken it.

The topic is important because waka umanga would be statutory bodies and as such their charters and operations must fit with human rights, gender equity, good governance standards and fair, transparent and democratic processes. And so standards were set for the tribes and the tribes were encouraged to adopt those standards themselves.

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6 New Zealand Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC Report 92 June 2006), para 4.92-4.104. Available online <www.lawcom.govt.nz/project/maori-legal-entities>.

7 Tāmaki Makaurau Settlement Process Report, Wai1362 June 2007.

### F. *Fairness in formation*

I should mention that corruption was also a significant issue for the Commission because of the evidence of inadequate notices, stacked hui, railroading and voting manipulation in past tribal entity formation. For the lack of some law on entity formation there was nothing the courts could do, but the Waka Umanga Bill proposed a law to remedy this state of affairs. The promoters of tribal corporations would have been obliged to devise and comply with democratic formation plans with transparent and just processes, all of which might be vetted by the Māori Land Court.

However, that should not be seen as part of the measures to change custom. It is rather to change some current, aberrant practices, and to restore the ideals of personal integrity that custom expects of its leaders.

### G. *Choices*

While I have mentioned that minimum standards are required for honesty in formation and operational processes, prescription in the Waka Umanga Bill was otherwise kept to a minimum. The thrust had been to leave the tribes with adequate scope to fashion their entities in ways that best suit them. The Commission had sought mainly to provide the coat hanger on which the tribes can hang a coat of their own fashioning. This was meant to give effect to the principle of autonomy in article 5 of the draft declaration of indigenous peoples' rights.[8]

Indeed, whether or not a waka umanga was formed at all was up to the tribe. The intention was not to tell people what to do but to add another tool to those already available for those who find it useful.

### H. *Dispute resolution*

Another large concern was the many bitter and protracted disputes over the right to represent the tribe and manage its business. It was of major concern for the Law Commission that for lack of any legal avenue to manage the problem, strong arm tactics were becoming the order of the day. Put simply, the law was failing Māori people.

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8 The Declaration was adopted by the United Nations General Assembly on 13 September 2007. Article 5 reads: "5. Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State". Available online <www.un.org/esa/socdev/unpfii/en/declaration.html>, accessed 16 November 2011.

The Commission's preferred solution has been to promote internal dispute resolution. Access to courts should be a matter of last recourse, and with the courts determining fair process, rather than policy issues, or determining a just process by which tribal members can resolve policy issues themselves.

In the past, it was inevitable that the courts should take over from the customary way, for once state governance became effective in the districts, there was nothing to make the customary system binding. Today, however, Western governments have recognised that for many matters, perhaps most matters, mediation and arbitration is the better way to go. For Māori, these processes must serve to restore the custom law focus on building harmony and balance in community relationships.

Accordingly, mediatory mechanisms were proposed to manage formation and operational disputes, to constrain unnecessary court actions and to make mediated solutions binding. In time the skills acquired would no doubt be useful in other areas of disputes or complaints about conduct, as well. In addition, to put some reins on those who would run too readily to the courts, with complaints about tribal activities that are sometimes unfounded, provisions were proposed for complaints to be referred to independent complaints officers in the first instance, to inquire and if need be to seek some resolution.

### I. *Urban groups*

In addition, the Commission had to deal with the reality of urbanisation. It concluded that waka umanga should also be available for tribal and multi-tribal urban groups as well. These have played critical roles in maintaining Māori culture among the urban dwellers and generally in reaching out to urban Māori. Waka umanga were really designed for groups with substantial assets, but some urban groups now fit the bill, often because of their many years in running government service contracts.

## III. Conclusion

As I have said, it would have been optional to create a waka umanga. But there were incentives to do so at the time, and would be now if the idea were to be revived. I would argue that waka umanga would provide a better assurance for affected parties that the entity is properly mandated and is lawfully able to represent the relevant tribal group; that they would give greater confidence for members and outsiders that matters will be handled honestly and according to

reasonable standards of good governance; and that there would be some greater assurance to the tribe that complaints and disputes will be better managed and managed within the tribal framework.

But most especially I would argue that there is some greater assurance that tribal entities would be formed with more independence from government, that they would be formed in greater accordance with custom, and that they would be better structured to uphold and strengthen the important values of custom law.

*EDITOR'S POSTSCRIPT*. As I noted in the introduction to this volume, this overview of the proposed Waka Umanga legislation was highly topical when it was delivered at the Tūhonohono symposium, and legislation embodying these ideas was already in preparation. The Waka Umanga (Māori Corporations) Bill was subsequently introduced to the House of Representatives on 11 December 2007, when the House was sitting under urgency, and received its First Reading and committal to the Māori Affairs Select Committee when the session resumed on 13 December. It was vigorously opposed by National Party speakers on a number of grounds, principally that there was no evidence that Māori wanted it, it was unnecessary, and it represented a return to a patronising colonial attitude on the part of government. It was a government-sponsored bill and supported by both Labour and New Zealand First speakers on its introduction, while speakers from the Green and Māori parties were ambivalent but willing to let it proceed to the Committee stages. It emerged from the Committee on 8 September 2008, with key aspects removed, for example the concepts of waka pū (entities established by tribal groups which under certain conditions could seek recognition as legitimate representatives of those groups) and waka tumaha (entities established by Māori associations) and the provisions relating to them, and establishing a new but undefined category of "Māori collectives" to replace them, without giving such entities the capacity to become "legitimate representatives" of an iwi. The NZ Parliamentary Library Bills Digest noted that in the amended legislation the waka umanga would "have little status distinct from incorporated societies … except that they must have a Māori membership …".[9] The bill did not proceed to second reading before Parliament adjourned in 2008, and was finally dropped from the order paper without debate under the new National Party-led government in December 2009.

Justice Durie's presentation and the subsequent fate (for the time being at least) of the proposals he articulated provide an excellent example of the challenges faced by innovative approaches based on one set of customary concepts when these may disrupt alternative accommodations of custom and

9 NZ Parliamentary Library Bills Digest 1700 at 2.

modernity which have attracted their own vested interests. One National Party member described the proposals as based on "dream-time imagery in the minds of cultural fellow travellers and social engineers",[10] a comment clearly directed at the author of the paper, his associates at the Law Commission and colleagues, many of whom were, as Justice Durie notes in this chapter, closely connected with the co-hosts of the Tūhonohono symposium, Te Mātāhauariki Institute. A more measured critique came from Te Ururoa Flavell of the Māori Party at the conclusion of the Select Committee's deliberations:[11]

> The Māori Party was very interested to hear the views of the submitters, and voted for the bill at its first reading to ensure that the views of hapū and iwi could be heard by the Māori Affairs Committee of Parliament. We noted that our concerns about rangatiratanga and due recognition were also very much top of mind for hapū and iwi.
>
> Given the substance of concerns and opposition voiced by hapū and iwi on the Waka Umanga (Māori Corporations) Bill, the Māori Party cannot support it.
>
> More work is needed to solve the inadequacies of current legal structures. For any such programme to be fruitful, it will need to proceed from a kaupapa Māori basis, and also address wider concerns with Treaty settlements policy.

A contrary view, however, was later expressed by Dr Robert Joseph, a participant in the Symposium, Mātāhauariki researcher and contributor to this volume, which underlines the importance of Justice Durie's contribution to this publication:[12]

> Whether the new developments in Māori governance such as the recent Waka Umanga Bill would have ushered in a new era or a new error for contemporary Māori governance depended on the voice of the people and politicians. But the current failure of the Waka Umanga Bill to be seriously considered in Parliament and among many of the tribes is a grave cause for concern. Contemporary Māori governance has entered into a new error – maintaining the hegemonic status quo, denial, a high propensity for litigation, and even paternalism – but the key difference this time is that it has occurred with the people's consent.

10 Christopher Finlayson, 644 NZPD at 13878.

11 Waka Umanga (Māori Corporations) Bill, 2008 No 175-2, as reported from the Māori Affairs Committee, Commentary, at 21.

12 "Contemporary Māori Governance: New Error", in NZ Law Society *Running and Governing Māori Entities*, Part II (NZLS, Wellington, 2010).

# Legal Challenges at the Interface of Māori Custom and State Regulatory Systems: Wāhi Tapu

Robert Joseph

*He whenua, he wāhine, e ngaro ai te tangata –*
*Men will die for land and women.*[1]

## I. Introduction

Most cultures and societies consider certain areas of land to be sacred spaces whether it be cemeteries, battles sites, or places of spiritual significance such as the Wailing Wall and Dome of the Rock in the Holy Land, Stonehenge in Britain, Maraeātea in the Pacific, or Intihuatana at Macchu Picchu in the Andes. But unlike these sites, Māori wāhi tapu (sacred places) are rarely a visible structure but rather a site or area within the landscape with values so significant that restrictions are warranted.

To Māori, the tribal whenua (landscape) and specific wāhi tapu are considered sacrosanct and as the aphorism above emphasises, Māori historically were willing to die for these sacred spaces (and for women of course!). Indeed, the late Sir Hugh Kawharu opined:[2]

> Māori land tenure was requiring a man to fight to preserve his community's estate. … The whole land of the tribe belonged to all of the tribe and acknowledged themselves bound to join together the other sections in defending all or part of the tribal estate from encroachment of strangers.

Many battles have been fought over wāhi tapu. One of the first recorded battles was in 1772 when French sailors committed the hara (crime) of desecrating a temporary wāhi tapu at Manawaora Bay in the Bay of Islands. Some members of the local tribe had drowned, and tapu status had been temporarily applied to the Bay. Captain Marion du Fresne and his party had been fishing in this area despite warnings by Māori about the tapu. Local Māori subsequently

1 Mitchell *Takitimu* (AH Reed Publishers, Wellington, 1944) at 227. Māori whakatauki (proverbs, aphorisms) can also be located in H Mead and N Grove *Nga Pepeha a nga Tupuna* (Victoria University Press, Wellington, 2001) at 134.

2 H Kawharu *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) at 42.

executed du Fresne and 26 crew members for the desecration of the wāhi tapu.[3] The heart of this instance and other wāhi tapu battles has been the actual or proposed transgressions of their sacredness.

Hence, in earlier years blood was shed and men did die. Today, battles tend to occur in the Environment and High Courts but are just as passionate. Recent decades have seen conflicts where wāhi tapu were threatened by new highways, railroads, airports, prisons, residential and commercial developments, wind farms, power stations and waste dumps.

This chapter will discuss some of the numerous battles fought over the preservation or development of these sacred places in Aotearoa-New Zealand. The chapter first analyses the importance of a Māori world-view, general Māori values, and tikanga Māori (customary law) over the land to establish a foundation for understanding Māori law and wāhi tapu in context. Contemporary disputes involving wāhi tapu will then be explored in some detail. The chapter concludes with two pragmatic and relatively simple suggestions when negotiating development over wāhi tapu: involvement of competent Māori within the decision-making processes; and referring to well-audited sources such as the *Te Mātāpunenga* project of the Te Mātāhauariki Research Institute at the University of Waikato.

## II. Māori World-view

The negotiating processes that occur at the interface of two different legal systems – in the present case general tikanga Māori customary law and British common law, and specific wāhi tapu disputes within State regulatory systems within New Zealand – are extremely complex. The protracted and multifaceted disputes that erupt at this interface highlight the importance of acknowledging diversity and appropriately recognising the "other" within the legal system. Indeed, the historic and contemporary disputes around wāhi tapu illustrate the importance of "other" world-views, cultures, and "different" but effective laws and institutions. The chapter will now explore the relevance of a Māori world-view, Māori values and Māori law.

3 See J Dunmore *The French and the Maori* (Heritage Press, Waikanae, 1992). See also A Salmond *Two Worlds: First Meetings Between Maori and Europeans, 1642–1772* (Viking, Auckland, 1993) at 386.

Articulating a world-view as *the* world-view of a culture is problematic given that all cultures manifest diversity. Still, a world-view generally orientates the human being and their community to the world so that it is rendered understandable and their experience of it is explainable. Māori Marsden's economical definition of a culture's world-view is instructive:[4]

> Cultures pattern perceptions of reality into conceptualisations of what they perceive reality to be; of what is to be regarded as actual, probable, possible or impossible. These conceptualisations form what is termed the "world view" of a culture. The world view is the central systematisation of conceptions of reality to which members of its culture assent and from which stems their value system. The world view lies at the very heart of the culture, touching, interacting with and strongly influencing every aspect of the culture.

Within any group in society there are likely to be a range of views, and these may naturally change over time, space or with leadership and personnel changes. Despite this difficulty, world-views are an important factor in a diagnostic, as well as predictive, sense. Looking forward, knowing the ground rules allows one to establish those things that are amenable to change, and those things that are "not negotiable". In terms of diagnosis of the current Māori situation, a world-view helps to explain observed outcomes and behaviour.

The reconciliation of Māori world-views with the demands of a mainstream capitalist legal system is essentially a first step of polyphyletic jurisprudence. It should not be assumed, however, that there is a fundamental conflict between mainstream New Zealand law and Māori world-views and customary law. Rather, one should consider the extent to which the existing Māori customary laws and institutions are able to translate behaviour consistent with the uniquely Māori world-view into actions which also produce successful outcomes in the modern legal system. Clearly, the success of low Māori crimes rates within the legal system prior to and following the Treaty of Waitangi in 1840 and right up to post-Second World War suggests that, for the most part, this translation can work well. It is also important to ensure that where failure occurs, the quality of the customary laws and institutions and the legal system itself are examined before underlying values are blamed. In the case of Māori, current mainstream laws and institutions are often imposed from the outside.

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4 CT Royal *The Woven Universe: Selected Writings of Rev. Māori Marsden* (Estate of Rev. Māori Marsden, 2003) at 56. See also C Royal *The Purpose of Education: Perspectives Arising from Mātauranga Māori: A Discussion Paper* (Report prepared for the Ministry of Education, Version 4, January 2007) at 38.

## A. *Māori Values*

The Marsden definition above draws the link between world-view and values. If you see the world in a certain way, this will determine what you value in the world (and what you don't) and how you value it through one's behaviour which gives rise to the well known triumvirate – world-view, values and behaviour. This view holds that world-view acts as a "base" upon which values are developed and acted upon within the behaviour of a culture. By understanding the world-view of a culture, we can come to an understanding of its values and thereby its behaviour.

World-views, culture and social institutions provide a template through which people perceive the opportunities and threats facing them, and which translate reactions to such opportunities and threats into action. There is little doubt that some cultural and institutional settings are more conducive to a constructive assessment of the available options and to purposeful action.

Perhaps the one aspect of a distinctive Māori world-view that is most obvious is the value of whānaungatanga (kinship) manifested in the apparent preference for collectivism. The language of Māori is unequivocally framed in collective terms such as whānau (family), hapū (sub-tribe) and iwi (tribe). These structures are seen as the foundations upon which notions of Māori customary laws and institutions are built. Individuals are rarely spoken of. Given this ideal, there are obvious questions around the effects of a collectivist view in a seemingly individualistic world. The impact of the rise in urban Māori as well as many Māori overseas and (generally speaking) their seeming lack of affiliation with traditional tribal structures further complicates things but clearly needs to be taken into account. Table 1 below illustrates potential sources of conflict and misunderstanding, arising from different world-views in relation to land.

Table 1: Māori and Colonial Attitudes to Land[5]

| Category | Māori | Colonial |
|---|---|---|
| **Ownership** | Collective (tribal) | Individual title |
| **Proof of ownership** | Occupation, use | Deed of sale |
| **Significance** | Economic, spiritual | Economic, status |
| **Transfer** | By conquest, abandonment or succession | By sale or lease or Crown directive |
| **Occupants** | Part-owners, trustees | Owners or tenants |
| **Classes of land** | Ancestral (take tupuna)Gifted (take tuku)Conquered (take raupatu) | Freehold, leasehold, waste land/arable land |
| **Utilisation** | Agriculture, hunting, resource management | Agriculture, horticulture, mining settlements |
| **Value** | Tribal identity and security for next generations | Market potential, employment |

While the concepts in the table are obviously simplified, they do highlight some of the more obvious world-view differences. In terms of Māori attitudes, some researchers have reported that a Māori world-view, based mainly on traditional values, is seen as highly relevant in modern-day Māori and New Zealand society and is fundamental for forming principles and a guiding philosophy for an Aotearoa-New Zealand polyphyletic jurisprudence. An effective New Zealand legal system requires an understanding and alignment with the values, institutions and cultural norms prevalent within Māori society too. Māori culture informs and legitimises conceptions of self, of social and political organisation, of how the world works and of how the individual and group appropriately work in the world.

On the other hand, an emphasis given to Māori customary laws and institutions will vary in different settings because cultures value process, form and outcomes differently. There are significant tensions at play for Māori between individual rights and whānau (family), hapū (tribe) and communal obligations; between the "objective" application of the rule of law, as against greater weight being given to traditional customary laws and tikanga Māori in decisions, between an impartial judge and kaumātua making decisions. Nevertheless, it is important that Māori customary laws and values are not undermined, but recognised and accommodated in a way that contributes to law and order.

5 M Durie *Te Mana Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998).

## B. *Values-based Law – Tikanga Māori*

While Māori displayed a variety of cultural patterns, Māori as a people lay claim to a set of abstract values and ways of organising social life that are distinctively Māori and refer to these ways as tikanga Māori. Tikanga Māori is about values, principles or norms which determine appropriate conduct, the Māori way of doing things, and ways of doing and thinking held by Māori to be just and correct. History points to Māori people and their culture being constantly open to evaluation and questioning in order to seek that which is tika – the right way. Maintaining tika or tikanga is the means whereby values for law and order, and social control, can be identified. Tikanga are established by precedents and validated by more than one generation, and vary in their scale, as rules of public through to private application. Tikanga Māori is the traditional body of rules and values developed by Māori to govern themselves. The phrase "tikanga Māori" is increasingly being used to mean Māori culture and the rules or guidelines for living generally accepted by Māori as tika (right, correct).

However, tikanga is not a singular monolithic thing but rather a collection of customary ways. Professor Hirini Mead's recent work is an authoritative and accessible introduction to tikanga Māori, which provides understanding of the correct Māori ways of doing things, traditionally and today.[6] To complicate things further, tikanga is sometimes described as Māori law, kawa as ritual and procedural law particularly on marae (Māori gathering places), and ture is described as church law, Western institutional law and institutional Māori land law. Ritenga (likeness, a repeated pattern, hence custom), kaupapa (plan, scheme, proposal) and whakaaro (thought, way of thinking) are also important values and conceptual regulators of Māori society. Exactly which of these meanings is intended can be determined only by reference to the context of use, and even then, the other meanings are present as over- and undertones. Indeed, as Lord Cooke observed"[7] "In law, context is everything."

In summary, the principles of tikanga Māori provided the traditional base for the Māori jural order and, for this chapter; tikanga embodies core values and principles that reflect doing what is right, correct or appropriate in a law and order context. It refers to the correct or proper courses of action as seen by Māori.

The chapter will now explore the legal authorities and precedents for acknowledging tikanga Māori within the legal system.

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6 H Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, and Te Whare Wānanga o Awanuiārangi, Whakatāne, 2003) at 234.

7 Quoting Lord Steyn *McGuire v Hastings District Council* [2001] NZRMA 557 at 561.

## III. Historic Legal Authority for Recognising Māori Customary Laws and Institutions

### A. *Aboriginal Title*

One of the legal principles for acknowledging and maintaining tikanga Māori customary laws and institutions within the legal system is the common law doctrine of Aboriginal title. English common law presumes and recognises some continuity of the local Aboriginal law subsequent to British annexation.[8] Elements of pre-existing Aboriginal rights (dominium) were not extinguished but were subject to the Crown's plenary powers during the assumption of sovereignty.[9] The elements of Aboriginal title maintained were those that were not repugnant to common law and which did not interfere with or challenge the new sovereign (imperium).[10] Specific rules of Aboriginal title provide for the continuity of tribal property rights and are common law rules establishing a type of legal pluralism.[11] The continuity of the tribal title is defined by Māori customary laws, thereby implicitly acknowledging that Māori had a functional legal system; and that rangatira (leaders) retained a certain amount of legally recognised *de jure* power perhaps even as late as the Second World War. Māori certainly retained territorial title rights to land and water,[12] including the marine and coastal area,[13] and non-territorial rights to, inter alia, customary fisheries[14] based on customary law.

### B. *Treaty of Waitangi 1840*

The Treaty of Waitangi 1840 is the other authority which affirmed Aboriginal title. It recognised Māori customary law in Article II: "... te tino rangatiratanga ... o ratou *taonga katoa*" [emphasis added]. The English text defines this phrase as the "full exclusive and undisturbed possession of their … *other properties*"[15] [emphasis added]. In 1860, Governor Gore Brown acknowledged taonga as "all other possessions".[16] On the other hand, the Waitangi Tribunal

8 *The Case of Tanistry* (1608) Davies 28 (KB); *Memorandum* (1722) 2 P Wms 75 (PC); *Campbell v Hall* (1774) 1 Cowp 204 (KB).

9 P McHugh "Constitutional Theory and Māori Claims" in H Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 40.

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

11 Ibid., at 51. R Boast "Treaty Rights or Aboriginal Rights" (1990) NZLJ at 32, 33.

12 *Te Rūnanganui o Te Ika Whenua Inc. v Attorney-General* [1994] 2 NZLR 20.

13 *Attorney-General v Ngati Apa* [2003] 3 NZLR 577.

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

15 Kawharu, above n 3, at 317.

16 *Maori Messenger* (10 July and 26 July 1860).

recognised that taonga katoa includes "all valued customs and possessions".[17] The Tribunal subsequently noted that *taonga* in a metaphorical sense covers a variety of possibilities rather than itemised specifics,[18] or simply objects of tangible value.[19]

McHugh points out that Governor Hobson was instructed to not propose or assent to any Ordinance that would result in Māori being treated less favourably than Europeans, inferring that the promise of te tino rangatiratanga in Article II included the continued viability of customary law and the chiefs thought that they were to retain their customary authority among their own people.[20]

Under these juristic definitions and applying an *ejusdem generis* approach, taonga katoa in the Treaty should be construed to include Māori customary laws. Māori custom was treasured by the ancestors, and was an intangible object of immense value. It still is for many Māori today. Jackson confirmed that the undertaking to preserve "other properties" in Article II included "all things highly prized as their own *customs* and culture"[21] [emphasis added]. William Colenso also described an incident prior to signing the Treaty where Governor Hobson agreed to protect Māori custom in the alleged fourth Article of the Treaty (albeit in that case an oral article).[22]

In summary, the common law doctrine of Aboriginal title and the partnership provisions within the Treaty of Waitangi strengthen the axiom that Māori customary law was not only to be officially recognised within the legal system, but to be preserved and protected by the Imperial, Colonial and subsequent post-Colonial Governments of New Zealand. The Treaty thus sought to encourage the integration of Māori customary and English common law.

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17 Waitangi Tribunal *Report Findings of the Waitangi Tribunal Relating to Te Reo Māori* (Wai 11, Wellington, 29 April 1986) para 4.2.4; 4.2.8, 4.2.3, at 20.

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

19 Ibid., para 4.2.4; and 4.2.8.

20 P McHugh *The Māori Magna Carta* (Oxford University Press, Auckland, 1991) at 287.

21 M Jackson *He Whaipaanga Hou – A New Perspective – Māori and the Criminal Justice System* (Department of Justice, Wellington, 1988) at 49.

22 W Colenso *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Capper Press, Reprint, 1890) at 31. The alleged fourth Article orally stated: "*E mea ana te Kawana ko nga whakapono katoa o Ingarani, o nga Weteriana, o Roma, me te ritenga Maori hoki e tiakina ngatahitia e ia* – The Governor says that the several faiths (beliefs) of England, of the Wesleyans, of Rome, and also Māori custom shall alike be protected by him." See C Orange *The Treaty of Waitangi* (Allen & Unwin and Port Nicholson Press, Wellington, 1987) at 53.

## C. *Tikanga Māori Customary Law Precedent*

With the above legal backdrop underpinning the settlement of Aotearoa-New Zealand, in 1840 Governor Hobson pragmatically issued orders to Shortland, police magistrate of Kororareka, that "a rigid application of British law to the Māori should be avoided in favour of some sort of compromise".[23] Official instructions were forwarded from London directing the Governor to respect and uphold tikanga Māori within the legal system. In 1842, Lord Stanley suggested that certain Māori institutions such as tapu (restriction laws) be incorporated into the system.[24] Stanley also directed that legislation be framed in some measure to meet Māori practices including punishment for desecrating wāhi tapu.[25]

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

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

The section provided for the establishment of native districts where tikanga Māori would prevail between Māori *inter se*; however, s 71 was never implemented.[26]

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23 Cited in P Adams *Fatal Necessity: British Intervention in New Zealand 1830–1847* (Oxford University Press, Auckland, 1977) at 211, 286.

24 Lord Stanley, Secretary of State for the Colonies, *Memorandum* (23 August 1842).

25 Lord Stanley, *Minute* (23 August 1842, Colonial Office Records 209/14) at 202.

26 See R Joseph *The Government of Themselves: Case Law, Policy and Section 71 of the New Zealand Constitution Act 1852* (Te Mātāhauariki Research Institute, University of Waikato Press, Hamilton, 2002).

## IV. Judicial Denial of Māori Custom

Following the Constitution Act 1852, the judiciary diminished its legal obligations to recognise Māori customary usage and law until customary title was extinguished. In *Re The Lundon and Whitaker Claims Act 1871*,[27] the Court of Appeal reasserted that "the Crown was bound, both by the common law of England and by its solemn engagements, to a full recognition of native proprietary right".[28] The Court stated "whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it".[29] However, in *Wi Parata v Bishop of Wellington*,[30] the tide turned when Prendergast CJ held that Māori custom and usage did not exist. He concluded that:

> Had any body or custom, capable of being understood and administered by the Courts of a civilized country, been known to exist, the British Government would surely have provided for its recognition, since nothing could exceed the anxiety displayed to infringe no just right of the aborigines. …
>
> Whatever may be meant by the phrase "the persons or property, whatever real or personal, of the Maori people," the next following words, "and touching the title," can only signify that the Court is enabled and required to entertain and determine questions of native title. The [Native Rights Act 1865] speaks further on of the "Ancient Custom and Usage of the Maori people" as if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being.
>
> As we have shown, the proceedings of the British Government and the legislation of the colony have at all times been practically based on the contrary supposition, that no such body of law existed; and herein have been in entire accordance with good sense and indubitable facts. …
>
> If therefore, the contention of the plaintiff in the present case be correct, the Native Land Acts, guided only by "The Ancient Custom and Usage of the Maori people, so far as the same can be ascertained," is constituted the sole and unappealable judge of the validity of every title in the country.
>
> Fortunately we are not bound to affirm so startling a conclusion. The Crown, not being named in the statute, is clearly not bound by it; as the Act, if it bound the Crown, would deprive it of a prerogative right, that namely of conclusively determining when native title has been duly extinguished.[31]

27 (1871) 2 NZ (CA) 41.
28 Ibid.
29 *Re The Lundon and Whitaker Claims Act 1871* (1871) 2 NZ (CA) 41, 49.
30 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 79.
31 Ibid., at 77–78 and 79, 80.

The legal ramifications of Prendergast CJ's mantra were that no Māori custom existed because Maori were uncivilised barbarians with no system of law; and any recognition in statute of Māori custom could be disregarded because such custom does not exist! To add salt to the wounds, Prendergast CJ also deemed the Treaty of Waitangi a "simple nullity" for the same reason – Māori lacked the legal capacity to enter into an international treaty.

Prendergast CJ reinforced this finding in *Rira Peti v Ngaraihi Te Paku*[32] when he held that native districts, pursuant to s 10 of the New Zealand Government Act 1846,[33] were never appointed because Māori were British subjects governed by the laws of the land and not by their usages.[34]

The Law Commission commented on a number of factors that combined to ensure that the settlers' legal system was geared towards the eclipse and assumed extinguishment of tikanga Māori customary law which included:[35]

a) The belief that English institutions and culture were innately superior, and it was in the best interests of Maori to assimilate;

b) The desire to create an ideal English society in New Zealand;

c) The introduction of English laws and internalizing colonial values; and

d) The settlers desire for land resulting in land alienation from Maori.

Māori Aboriginal title rights and Treaty of Waitangi rights and many of their tikanga values, customary laws and institutions were marginalised through judicial and political conservatism and lay legally dormant following the *Wi Parata* decision until the Treaty of Waitangi Act 1975 and the establishment of the Waitangi Tribunal – just under 100 years! The Waitangi Tribunal was the catalyst that resurrected tikanga Māori customary laws and institutions and the "principles" of the Treaty of Waitangi significantly within the New Zealand legal system.

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32 (1889) 7 NZLR 235.

33 The New Zealand Government Act 1846 was the forerunner to the New Zealand Constitution Act 1852. Governor Grey managed to have the former Act suspended and subsequently overridden by the latter. Section 10 in the former statute was the equivalent to s 71 native districts in the latter statute.

34 *Rira Peti v Ngaraihi Te Paku* (1889) 7 NZLR 235, 238–239.

35 New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) at 22 para 97.

## V. State Provision for Wāhi Tapu

Despite the major societal transformation of New Zealand society and Māori communities, the changes to tikanga Māori rarely produced changes to the "fundamental value system".[36] Tikanga Māori was and still is regularly adhered to by many Māori, whether consciously or unconsciously, in the everyday management of the landscape, community and family affairs.

New Zealand's positivist legal system, however, tends to ignore tikanga Māori and the Treaty of Waitangi unless they have been included in legislation or in the common law. On the other hand, there are now a number of statutes that recognise tikanga Māori, including the Treaty of Waitangi Act 1975,[37] the Resource Management Act 1991,[38] the Māori Fisheries Act 2004,[39] and the Marine and Coastal Area (Takutai Moana) Act 2011. Then there is an array of statutes that refer to the Treaty of Waitangi, which by implication includes tikanga Māori.[40]

Although the courts apply Māori custom where statutes so allow, the Judges have also been prepared recently to apply Māori custom even without a statutory reference where custom is a relevant fact or the Treaty of Waitangi is a relevant consideration.[41] In addition, Māori customary law can provide the basis for title in land,[42] forms the basis for fishing rights,[43] and can assist in the definition of a statutory concept.[44] It is to the inclusion of Māori values and the contemporary use of tikanga Māori with specific reference to wāhi tapu and the litigation battles that have emerged that this article will now explore.

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36 T Bennion (March 2001) Maori LR, available online <www.bennion.co.nz/mlr/2001/mar.html> (last accessed January 2011).

37 Treaty of Waitangi Act 1975, Schedule 1.

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

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

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

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

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

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

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

## A. *Waitangi Tribunal Stance on Māori Values*

The contemporary importance of Māori cultural values was examined by the Waitangi Tribunal in its 1985 Manukau Report.[45] The Tribunal considered the issue of taking water from the Waikato River at a point some miles from the sea and discharging it into the Manukau Harbour, rather than allowing the water to reach the sea via the Waikato River mouth, some distance south of the Manukau Harbour. The objection was entirely a tikanga "metaphysical" one, that the mauri (life force)[46] of the Waikato should not be mixed by human intervention in this way with the mauri of the Manukau Harbour and "dead" or "cooked" water should not be discharged to living water that supplies seafood.

The Tribunal first pointed out that "the values of a society, its metaphysical or spiritual beliefs and customary preferences are regularly applied in the assessment of proposals without a thought as to their origin".[47] The Tribunal continued:[48]

> In our multicultural society the values of minorities must sometimes give way to those of the predominant culture, but in New Zealand, the Treaty of Waitangi gives Māori values an equal place with British values and a priority when the Māori interest in their taonga is adversely affected. The recognition of Māori values should not have to depend upon a particular convenience as when the meat industry found it convenient to introduce Halal killing practices to accommodate Islamic religious values.

The "current" values of a community:[49]

> … are not so much to be judged as respected. We can try to change them but we cannot deny them for as Pascal said of the Christian religion, "the heart has its reasons, reason knows not of." That view alone may validate a community's stance.

Later in the report the Tribunal noted that Māori values were not opposed to development. Rather, there was a difference of emphasis from European values:[50]

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45 Waitangi Tribunal *The Manukau Report* (Wai 8, Wellington, 1985) at 77.

46 Mauri is the life principle or life force of animate and inanimate things such as people, places, forests, water bodies, land and the general environment. See R Benton, A Frame and P Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, University of Waikato, Hamilton, CD Version, 2007) and Mead, above, n 7.

47 Benton, Frame and Meredith, above n 47, at 78.

48 Ibid. The halal reference recalls the period when New Zealand abattoirs killed meat in accordance with Muslim religious practices for export to Muslim countries.

49 Ibid, at 124.

50 Ibid, at 123–124.

> Māori society … has tempered what might have been a fundamental religious bar with a basic pragmatism, enabling modifications to the environment after appropriate incantations or precautionary steps. … We consider that Māori values ought to be provided for in planning legislation. We do not think that they should predominate over other values but we do think they should be brought into account and given proper consideration when Māori interests are particularly affected. And if Māori interests are not exclusively affected then there might at least be a search for a practical alternative if there is one, or a reasonable compromise.

B. *Contemporary Landscape Battles – Wāhi Tapu Litigation*

'Wāhi' refers to a place or locality.[51] 'Tapu' is a condition affecting persons, places and things, and is described as a prohibition but essentially its function is that of a protective device. Waddy defined tapu as:[52]

> [A] "Code of Law" far above and transcending all human laws, forming a Table of Māori Commandments, owing its authority partly to superstition and partly to fear, but based primarily upon political motives and common sense. Early Māori was ruled by the law of tapu.

Tapu also acted as a means of social control over people and the landscape. Best noted in this regard:[53]

> The system of tapu was a series of prohibitions, and its influence was very far reaching – so much so that it entered into all activities of native life. The laws of tapu affected all crises of life – birth, marriage, sickness, death, burial, exhumation, all industries; and no person in the community was exempt from its stringent rules. To disregard those rules meant disaster to the individual; but the punishment meted out to the transgressor was not inflicted by his fellow-tribesman – it was imposed by the gods.

Such a system of prohibitions was intended to safeguard the tapu of each person in relation to the community, the atua (gods) and the landscape.[54]

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51 H Williams *Dictionary of the Māori Language* (Government Printing Office, Wellington, 1985) at 474.

52 P Waddy "Tapu: A Code of Law: Criticism of Sir James Frazer's Views" in P Waddy "Early Law and Customs of the Maoris" (MA Thesis, University of Victoria, Wellington, 1927).

53 E Best *The Māori as He Was: A Brief Account of Māori Life in Pre-European Days* (Government Printer, Wellington, 1974) at 89.

54 M Shirres *Te Tangata: The Human Person* (Accent Publications, Auckland, 1997). See also M Shirres *Tapu: Te Mana o Nga Atua: The Mana of the Spiritual Powers. A Māori Theological Understanding of Tapu* (Te Rūnanga o te Hāhi Katorika ki Aotearoa, Ponsonby, 1994).

Given the permanence of the land, links to the landscape for Māori are links to the past and future. Implicit in the relationship to the landscape is the responsibility of present generations as stewards over the land given by past generations in trust for those of the future as the aphorism states, *Nōku te whenua o ōku tūpuna – Mine is the land of my ancestors*. Māori tribal landscapes are very important anchors for the tribe.

The contemporary use of Māori words and tikanga concepts such as wāhi tapu in a statute or other official texts provides fertile ground for litigation. Those provisions of the Resource Management Act 1991 (RMA), in particular the Māori trilogy key sections 6(e), 7(a) and 8,[55] were enacted to enable an appropriate balancing exercise to occur between development and the protection of Māori customary rights to the landscape.[56] As recognised by the courts, the Māori trilogy and related provisions:[57]

> … place the Court directly at the interface between the concepts of British common law (which has its genesis in Roman law) and the concepts of Māori customary law which is founded on tikanga Māori. The Treaty promised the protection of Māori customs and cultural values. The guarantee of Rangatiratanga [sic] in Article 2 was a promise to protect the right of Māori to possess and control that which is theirs:
>
> > "in accordance with their customs and having regard to their own cultural preferences."

Resource consent applicants and local authorities have generally avoided a "direct approach" to confronting Māori under the RMA until recent times. There are a number of reasons for this change including:

(1) a growing sophistication in the utilisation of the Māori provisions;

(2) the various RMA "successes" achieved by Māori; and

(3) the increasing utilisation of Māori academics/cultural advisers by resource consent applicants and others.

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55 Refer to Appendix I to view ss 6(e), 7(a) and 8.

56 See P Majurey "Environmental Issues" in New Zealand Law Society *Treaty of Waitangi* (New Zealand Law Society Seminar, Hamilton, August 2002) at 31–63.

57 *Land Air and Water Association v Waikato Regional Council* (Unreported, Judge Whiting, Environment Court, Auckland, A110/01, 23 October 2001 (Hereinafter *Hampton Downs*)) at 104. There, the Court considered a proposal to establish a large engineered land disposal facility at Hampton Downs north of Waikato. The proposal received considerable opposition from the local community including tangata whenua (local people).

From this direct approach, there is a growing judicial testing of the Māori spiritual and cultural paradigm including values and tikanga over the landscape. The result has been a significant increase in the resources and time local authorities have had to apply to Māori issues. This has led in many cases to resource management outcomes quite different from those which occurred prior to the enactment of the RMA when Māori cultural and spiritual values could be safely ignored or sidelined. However, while Māori values may now have entered the system, there is evidence that the system may not yet have the tools, or have developed a sufficiently informed approach, to dealing appropriately with those values.

A classic example is the contemporary New Zealand debate over wāhi tapu. Section 6(e) RMA provides that it is a matter of national importance to recognise and provide for "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sic], and other taonga [important places]". Section 6(f) protects historic heritage from inappropriate subdivision, use and development; and s 6(g) protects recognised customary activities.

Historic heritage is defined in s 2(b)(iii), RMA, as inter alia: sites of significance to Māori, including wāhi tapu. Section 42(1)(a) RMA adds that a local authority may, on its own motion or on application of any party to any proceedings or class of proceedings, make an order where it is satisfied that the order is necessary "to avoid serious offence to tikanga Māori or to avoid the disclosure of the location of wāhi tapu".[58]

In addition, the Ture Whenua Māori Act 1993 interprets wāhi tapu as a "place of special significance according to tikanga Māori".[59] The Historic Places Act 1993 noted that a wāhi tapu is "a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense"[60] while a wāhi tapu area means "an area of land that contains one or more wāhi tapu".[61] Wāhi tapu are referred to in the Biosecurity Act 1993,[62] Hazardous Substances and New Organisms Act 1996,[63] Local Government Act 2002,[64] and the Marine and Coastal Area (Takutai Moana) Act 2011[65] (see Appendix II of this chapter for

58 Resource Management Act 1991, s 42(1)(a).
59 Te Ture Whenua Māori Act 1993, ss 4 and 338(1)(b).
60 Historic Places Act 1993, s 2.
61 Ibid.
62 Sections 57, 60, 72 and 76.
63 Section 6(d).
64 Section 77(1)(c), and Schedule 11.
65 Sections 78 and 79.

a comprehensive list of current statutes that include wāhi tapu). The frequent inclusion of wāhi tapu in legislation provides fertile ground for battling out the concept in court.

In a number of cases, Māori opponents of development have argued that they will affect wāhi tapu covering several hectares of land. The Environment Court appears to have taken two general approaches. The first is a three-stage enquiry for claims of wāhi tapu and relies heavily on a close examination of the etymology of "wāhi tapu".[66]

> The first is to determine, as best as we are able in the English language, the meaning of the concept. The second is to assess the evidence to determine whether it probatively establishes its existence and relevance in the context of the facts of a particular case. If so, the third is to determine how it is to be recognised and provided for. When, as in the case here, it is alleged that a site is wāhi tapu, it is necessary: first to determine the meaning of wāhi tapu*:* second to determine whether the evidence probatively establishes the existence of wāhi tapu, and third, if it does, how is it to be provided for.

In addressing these steps the Environment Court had regard to the following documentary sources:

(1) dictionary definitions;

(2) Reports of the Waitangi Tribunal;

(3) definitions of tikanga Māori values in relevant RMA instruments; and

(4) other Acts forming part of the statutory scheme.[67]

Assertions of wāhi tapu have not only been met with evidence from Māori dictionaries but also Māori studies experts who claim that the term wāhi tapu applies to sites which are quite limited in area and associated with some religious or ceremonial event. For example, in the *Winstone Aggregates Ltd v Regional Council*[68] decision, the Court recorded evidence of wāhi tapu by Mr Buddy Mikaere, an alleged expert on Māori studies:[69]

> Mr Mikaere stated: "the point being that wāhi tapu are very small specified places."
>
> Mr Rima Herbet, the manager of the Ngāti Naho Co-operative Society Limited, gave evidence. He defined wāhi tapu:

66 *Winstone Aggregates Ltd v Regional Council* (Unreported, Whiting J, Environment Court, Auckland, A80/62, 28 April 2002) at 62. [Hereinafter *Winstone Aggregates*].

67 For example, the Historic Places Act 1993.

68 Ibid.

69 Ibid, at 69.

> … as physical features or phenomena, either on land or water, which have spiritual, traditional, historical and cultural significance to our people. Waahi tapu as conceived by Māori may originate from pre-contact history or from post-European history through to the present day. The waahi tapu identified up until recent times by us included cultivation areas and Māori earthworks and burial areas which are all of long-standing importance to the Māori people of our area.

In the *Land Air and Water Association v Waikato Regional Council*[70] decision, the Environment Court considered similar Māori academic evidence on the nature of wāhi tapu which was paraphrased by the Court:[71]

> In traditional Māori society a waahi tapu was a specific place – usually very small – within the tribal rohe or boundary. They were, by definition, strictly set apart from daily life because the tapu or spiritual restriction contained within such places posed dangers to all. Nobody went there or used such places for any purposes. ... The definition I [Mr Mikaere] have stated here lies behind the concept of waahi tapu and identifies them as places of high spiritual and religious danger. Because of the nature of their original use, old pa sites, fortifications, earthworks, cultivations and such like cannot be waahi tapu because they are associated with secular rather than religious activities.

This approach therefore finds that wāhi tapu refers essentially only to urupā (burial grounds) and ceremonial or spiritual sites, and that the term cannot usually cover places associated with purely secular rather than religious activities such as old pā sites, fortifications, earthworks and particularly cultivations.[72] This approach applies standard evidential tests.[73] In the *Hampton Downs* decision, the Court tested Māori academic evidence by a non-lawyer participant asking questions between a Mr Tukiri and Mr Mikaere:[74]

> Q: Would it be fair comment to say that your expertise comes more from tauiwi (foreigner) than from your own people?
>
> A: Which particular area are we talking about?
>
> Q: I am talking about your qualifications from university and qualifications on past mahi (occupation) that you've done.

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70 Above n 58 (*Hampton Downs*).

71 Ibid., at 111. This evidence sought, in part, to rebut the evidence of a Ngāti Naho kaumātua.

72 Above, n 58 (*Hampton Downs*) and above n 67 (*Winstone Aggregates*).

73 Above n 67 (*Winstone Aggregates*); *Countdown Properties (Northland) Limited v Dunedin City Council* [1994] NZRMA 145 (H.C); *Te Kupenga o Ngāti Hako v Hauraki District Council* (Unreported, Bollard J, Environment Court, Auckland, A 10/01, 23 January 2001).

74 Above, n 58 (*Hampton Downs*), at 112–113.

> A: The qualifications I hold are no different to qualifications any other Māori people hold issued by [the] same education institution. [I] don't see why I should be singled out because I am lucky enough to get there. My qualifications in that particular area, if we're talking about purely in [the] Māori world I've outlined my experience and how I obtained that experience in answer to questions put yesterday. I see no reasons to change those responses …
>
> Q: [Is it] fair to assume [that the] position [you] currently occupied here on behalf of [the] applicant and in the tauiwi [foreigner] world would give evidence today and not as your Māori side?
>
> A: [There are] several parts to that question, first is that this is a New Zealand rather than tauiwi institution, we are here before this institution because we support the processes of this country, when I am in this world I appear as part of this world so to speak. I cannot entirely put aside my Māori heritage of which I am extraordinarily proud. I believe in being present here, [I] can contribute by bringing some balance to the proceedings by appellants and s 274 interveners. I believe that in a number of instances those views are incorrect, they are incorrect in terms of factual accuracy, incorrect in interpretation of traditional tikanga, they do demonstrate evolution and continued evolution of Māori conceptual thinking; somebody needs to bridge the gap and I see that as my role.

The Court ultimately accepted Mr Mikaere's evidence that the site was not a wāhi tapu and therefore it did not have any particular cultural significance. This narrow definition does not sit well with a number of High Court decisions in which there is general acceptance that large areas, sometimes associated with secular activities, are wāhi tapu.[75] In the *Takamore Trustees v Kapiti Coast District Council*[76] decision, the High Court found that the general wāhi tapu area was sufficiently described. The inability to specifically point to areas within the wider area as site-specific locations of wāhi tapu was not critical.

In the *Hampton Downs* and *Winstone Aggregates* decisions,[77] the Environment Court moreover stated that it can rely upon Waitangi Tribunal Reports when it referred to the *Te Roroa Report*:[78]

> For Māori, wāhi tapu like taonga is an "umbrella term" that applies not only to urupā (burial grounds) but other places that are set apart both permanently and temporarily. These include places associated in some way with birth or death, with chiefly persons and with traditional canoe landing and building

75 In *Minhinnick v Watercare Services Ltd* [1998] 1 NZLR 6, 3 [hereafter *Minhinnick*], the stone fields were 29 hectares in size. Many of the activities associated with the area were of a secular nature such as cultivations and kainga (homes).

76 [2003] 3 NZLR 496. [Hereinafter *Takamore Trustees*].

77 Above n 67 (*Winstone Aggregates*).

78 Waitangi Tribunal, *Te Roroa Report* (Wai 38, Waitangi Tribunal, Wellington, 1992) at 227.

> places. Temporary tapu are usually imposed and removed on hunting and fishing grounds for cultivations to conserve and protect the resource. They also include places associated with particular tūpuna and events associated with them, set in order by whakapapa.

Interestingly, the High Court has not seen fit to define what is or is not a wāhi tapu probably because findings of fact have already been made in the Environment Court or there is agreement by all parties concerned that the subject site is a wāhi tapu. However, it is possible to glean some themes from the wāhi tapu litigation in the High Court.

As mentioned above, wāhi tapu are not limited to small discreet places. The wāhi tapu area in *Takamore Trustees v Kapiti Coast District Council*[79] was 25 acres,[80] 29 hectares in *Minhinnick v Watercare Services Ltd*,[81] and 56 acres in *Tawhai v Whakatane District Council and Te Rūnanga o Ngāti Awa*.[82] Furthermore, wāhi tapu sites appear to not be limited solely to activities of a religious, sacred or highly tapu nature. The Matukuturua stone fields included areas of garden, archaeological features and cultivations.[83] In *Ngāti Maru v Thames Coromandel District Council and Kruithof*,[84] the wāhi tapu site contained a pā site as well as tapu areas. In some High Court decisions, there was reference to a general wāhi tapu area as the *Ngāti Maru* decision.[85] However, in both the *Takamore Trustees* and *Ngāti Maru* decisions, the Courts seem to contemplate that within a general wāhi tapu area, there could be specific, more localised wāhi tapu.[86] In addition, in the *Ngāti Maru* decision, there was reference to a sacred waterway and adjacent area where sacred sites were located.[87]

The failure to register wāhi tapu status on relevant district plans is not critical to finding a wāhi tapu as in *TV 3 Network Services Ltd v Waikato District Council*[88] and *Ngāti Maru* decisions.[89] In cases in which the challenge as to whether a wāhi tapu exists or not, the Environment Court has jurisdiction to

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79 Above n 77 (*Takamore Trustees*).
80 (Unreported, 27 July 2003, Chambers J, HC Rotorua, CIV-2003-463-109). [Hereinafter *Tawhai*].
81 Above, n 76 (*Minhinnick*).
82 Above, n 81 (*Tawhai*).
83 Above, n. 76 (*Minhinnick*) at 63.
84 (Unreported, 27 August 2004, Laurenson J, HC Hamilton, CIV-2004-485-330) [Hereinafter *Ngāti Maru*].
85 Ibid.
86 Above, n 77 (*Takamore Trustees*); above, n 85 (*Ngāti Maru*).
87 Ibid.
88 [1998] 1 NZLR 360 [Hereinafter *TV3*].
89 Above, n 85 (*Ngāti Maru*).

make a finding of fact.[90] The failure to precisely locate the wāhi tapu site in question and failure to point to archaeological remains is not critical when claiming wāhi tapu status,[91] and it is an error of law for the Environment Court to reject as mere assertion the oral evidence of kaumātua (elders), as to the presence of koiwi (bones) and taonga (treasures) without giving a rational basis for that rejection. There is a clear requirement for the Environment Court to explain why it rejects such evidence when it can only be based on oral history. To accept only documented and precise evidence on such matters would mean that there would be little evidence in support of s 6(e) matters.[92] In all the cases in which wāhi tapu status was accepted, Māori witnesses were able to point to ancestral occupation and oral tradition of the spiritual importance of the site in question.

The Environment Court has on a number of occasions had to consider the issue of what constitutes a wāhi tapu. In *Winstone Aggregates*, the Court suggested a methodology which involves determining the meaning of wāhi tapu, determining whether the evidence probatively establishes the existence of wāhi tapu; and if the evidence establishes the presence of wāhi tapu, and discusses how it is to be provided for. In the *Winstone* and *Heta v Bay of Plenty Regional Council*[93] decisions, the Court stated that wāhi tapu must be objectively established, not asserted, by reference to material of a probative value which satisfies the Court on the balance of probabilities. General evidence of wāhi tapu over a wide and undefined area was not probative of a claim that wāhi tapu existed on a specific site.[94]

In the *Takamore Trustees* case (before the Environment Court) and the *Hampton Downs* decisions, the Court was critical of the evidence led by objectors on the basis that it was hearsay, general in nature, and lacked any specificity by way of oral tradition or historical foundation. However, the High Court's decision in *Takamore Trustees* means these comments will be treated with caution. Justice Young stated that unless kaumātua (elders) evidence of an oral nature was exposed as incredible or they were unreliable witnesses, or there was other credible and reliable evidence contradicting what they had to say, the Court cannot reject their evidence.[95]

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90 Above, n 81 (*Tawhai*).

91 Above, n 89 (*TV3*) and above, n 77 (*Takamore Trustees*).

92 Ibid.

93 *Heta v Bay of Plenty Regional Council* (Unreported, A93/2000, Judges Whiting, Dart and Gapes).

94 Above, n 67 (*Winstone Aggregates*).

95 *Te Kupenga o Ngāti Hako v Hauraki District Council and Waikato Regional Council* (Unreported, A010/2001, Judges Ballard, Hackett and McIntyre), above, n 58 (*Hampton Downs*) and above, n 67 (*Winstone Aggregates*).

In some cases, development has occurred despite claims of wāhi tapu status; for example, *Heta v Bay of Plenty Regional Council*[96] and *Beadle and Wihongi v Minister of Corrections and Northland Regional Council*.[97] But another successful wāhi tapu battle occurred in the 2007 decision of *Maungaharuru-Tangitu Society Inc and Ors v Hastings DC and Unison Networks Ltd*.[98] The Environment Court overturned a resource consent by the Hastings District Council to Unison Networks for Stage 2 of a project to construct and operate a wind farm at Te Waka on the Maungaharuru Range in Hawke's Bay. The Court concluded that Māori values were more important than issues of climate change and the use of renewable sources of energy. The Court commented on the relationship of Māori with the whenua (land):[99]

> The area of Te Waka-Maungaharuru has all of the features mentioned in s. 6(e) – land, water, sites, waahi tapu and other taonga. It was impossible not to absorb some of the depth of emotion expressed in the evidence about the attachment of the people to this area. It not only defines one of the boundaries of their tribal rohe or districts. It also helps to define them as individuals and as tribal and family groups. The relationship they have with it, despite no longer owning it, must be, we think, just the kind of relationship … of Māori, their culture and traditions … that drafters of the section had in mind, and which the legislation requires to be recognised and provided for as being of national importance.

An unusual and protracted case occurred in *Hemi v Waikato District Council and Ritchie*[100] where Hemi, a wealthy Māori with ancestral links to Whaingaroa (Raglan), proposed to build a house in Whaingaroa with much local Māori support, but was vehemently opposed by a prominent local non-Māori family on the grounds that part of the land was wāhi tapu.[101] The Environment Court had to consider disputed evidence about whether or not a taniwha (ancestral monster) resided along the coastline beneath the land, making it wāhi tapu and therefore inappropriate for the development of a dwelling place. Judge Harland found that there were no urupā or archaeological findings on the site which was indicative that the site was not wāhi tapu. However, even if it was, a tapu-lifting ceremony had been conducted by kaumātua prior to 1965 so that the land was not wāhi tapu any more.[102] Consequently, the consent was granted and the Hemi whānau could finally develop the coastal property.

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96 (Unreported, A93/2000, Environment Court, Judges Whiting, Dart and Gapes).

97 (Unreported, A74/2002, 8 April 2002).

98 *Maungaharuru-Tangitu Society Inc and Ors v Hastings DC and Unison Networks Ltd* (Unreported, Environment Court, Wellington, W24/2007, 13 April 2007, Thompson CJ).

99 Ibid., at 81.

100 *Hemi v Waikato District Council and Ritchie* [2010] NZEnvC 216.

101 Ibid.

102 Ibid., at para 166.

In summary, it appears there is a divergence of approach in the Environment Court and High Court as to the elements which constitute a wāhi tapu. There appears to be a difference of approach in discussing the activities associated with the site, the precise location of wāhi tapu sites, the size and scale of wāhi tapu, the use of outside experts and the emphasis to be placed upon oral traditional kaumātua (elder) evidence. Such contradictory approaches heighten the tension in these landscape conflicts. Protracted conflict over wāhi tapu is inevitable.

Predictably, wāhi tapu battles[103] continue to erupt around New Zealand in places such as the wāhi tapu Puketutu Island in the middle of the Manukau Harbour where the Manukau City Council wants to discharge 4.4 million cubic metres of treated sewage over the next 35 years;[104] protecting wāhi tapu along beautiful beaches in Whangara, Tolaga Bay and the Far North;[105] in opposition to a Lake Taupo tourist development on Acacia Bay;[106] the construction of the Sandhills Expressway to revamp State Highway 1 near Waikanae;[107] the protection of wāhi tapu waterways such as the Te Waikoropupu Springs in Golden Bay[108] and the Waikoko Spring in Hawke's Bay;[109] and Ngāti Kahu's successful opposition to investment banker Paul Kelly's development plans to build homes overlooking Karikari Beach on Doubtless Bay which is on top of a wāhi tapu cave where Ngāti Kahu say the bones of their ancestors were laid.[110]

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103 There are numerous contemporary battles over wāhi tapu. See, for example, "Waitara beach toilet plan runs into tapu" *The Daily News* (13 June 2003); "Sacred site ruling hits developers" *The New Zealand Herald* (29 April 2004); "Government bestows 'national importance' on Māori superstition 'ancestral landscapes'" *The Independent* (9 April 2003); "Landowners seek to reclaim property rights from wāhi tapu" *Stuff* (26 February 2003); "The non-sense of wāhi tapu" *The Nelson Mail* (11 December 2002); "Property rights extinguished by Māori tapu" *The Independent* (13 November 2002); "Hundreds sign petition against wāhi tapu" *New Zealand Herald* (3 December 2002); and "Clark defends wāhi tapu process", Television New Zealand (19 November 2002). For more recent examples, see the references below.

104 "Proposed 'poo tax' for island dumping", *New Zealand Herald* (18 May 2009). See also "Untouched world lies on our doorstep" *Manukau Courier* (5 January 2010).

105 "Idyllic area hiding its sacred treasures" *New Zealand Herald* (22 January 2009); "Beach fears played down" *The Dominion Post* (18 January 2009); and "Courts should decide beachfront land row – judge" *New Zealand Herald* (20 January 2009).

106 "House owner refusing to budge" *The Dominion Post* (6 October 2009).

107 "Iwi has grave fears over Waikanae expressway" *The Dominion Post* (17 December 2009).

108 "DoC brings in plan to protect famous spring" *New Zealand Herald* (6 April 2009).

109 "Manmade pond listed as sacred" *The Dominion Post* (18 August 2009).

110 P de Graaf "Iwi defeats US billionaire in holiday homes row" *The Northern Advocate* (4 October 2011).

The litigation over the Ngawha prison site in the 2002 decision of *Beadle & Wihongi v Minister of Corrections & Northland Regional Council*[111] indicates that these challenges of trying to define wāhi tapu through litigation are not going away. It suggests that, if anything, the incidence of these value arguments is likely to increase. That case involved substantial expert Māori witnesses both supporting and opposing the development and discussing the effects of the proposal on the ancient pathways of a taniwha (monster).[112]

It can also be noted that the Resource Management Act 1991 requires decision makers to recognise the need to protect historic heritage from inappropriate development, which includes "sites of significance to Māori, including wāhi tapu".[113] This is an important issue, not just because of the requirements of the RMA 1991, but also because the principles of natural justice require that people are given a fair hearing. Can that occur if the decision-making process (including decision makers) has insufficient information about the Māori values and evidence presented?

Given such complex issues when attempting to acknowledge tikanga Māori in legislation generally and wāhi tapu specifically, what are possible appropriate options to move towards a better understanding and treatment of these issues? There is the suggestion from the Judicial Committee of the Privy Council that the pool of decision makers at the Environment Court (and High Court) level ought to include people able to deal appropriately with Māori values:[114]

> It might be useful to have available for cases raising Māori issues a reserve pool of alternate Judges and Deputy Commissioners. At all events their Lordships express the hope that a substantial Māori membership will prove practicable if the case does reach the Environment Court.

Against this we may contrast the Court of Appeal approach in *Watercare Services Ltd v Minhinnick*,[115] where that Court was asked to support the notion that when considering whether the piping of sewage over wāhi tapu was "offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment". The appropriate test was what the ordinary Māori person would find objectionable. The Court of Appeal rejected that view, finding that the relevant test was that of the "ordinary

111 *Beadle & Wihongi v Minister of Corrections & Northland Regional Council* (A74/02. 8 April 2002).

112 Ibid.

113 Resource Management Act 1991, s 2(1): "historic heritage": (a)(iii) and (b)(iii).

114 *McGuire v Hastings District Council* [2001] NZRMA 557, 1 November 2001, Lord Cooke, para 28.

115 [1998] NZRMA 113.

person, representative of the community at large" – presumably no matter how ignorant that community might be of Māori values, or, more importantly, its own hidden assumptions and prejudices.

## VI. Testing the Evidence – *Te Mātāpunenga* Project

Resorting to dictionaries and documentary sources to prove or disprove the existence, extent and scope of tikanga Māori in a particular area tends towards the academic and away from the determinative spiritual and cultural context of Māori. As Metge notes:[116]

> 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.

Hence those qualified to articulate the values and practices inherent in tikanga Māori are usually Māori, especially competent kaumātua. But as illustrated above in this chapter, what happens when kaumātua slightly or even diametrically disagree with what constitutes "authentic" tikanga and wāhi tapu or the details and scope of a group's tikanga and values?

The work of Te Mātāhauariki Institute at the University of Waikato may be of some assistance here.[117] One of the key projects of Te Mātāhauariki Institute was the assembling of a collection of references to the concepts and institutions of Māori customary law to explore ways in which the legal system of Aotearoa-New Zealand could better reflect the best of the values and principles of both major component cultures. The first Director of the Institute, Judge Michael Brown, in consultation with the Institute's Advisory Panel, accordingly initiated *Te Mātāpunenga*,[118] which is an attempt to traverse the existing historical materials with a view to bringing together such references to customary concepts and institutions as appeared to come from an influential or authoritative source and/or to exhibit explanatory insight.

The Mātāhauariki researchers started with a list of terms denoting legal and normative concepts and institutions found to be in use in historical and contemporary Māori discourse. These were selected with the assistance of kaumātua. The researchers searched a wide range of records for entries which have been listed in chronological order under each title. Each entry consists

116 J Metge "Commentary on Judge Durie's Custom Law" (Unpublished Paper for the Law Commission, 1996) at 3.

117 See the Te Mātāhauariki Research Institute website <www.lianz.waikato.ac.nz>.

118 Benton, Frame and Meredith *Te Mātāpunenga*, above n 47.

of a sourced statement or explanation relevant to a particular title together with an explanatory preface intended to supply a context for the statement or explanation. The purpose of the context is to enable the reader to understand the circumstances in which the statement or explanation arose, and to judge its credibility and authority.

The researchers did not set out to determine what is or is not "true custom", or authentic tikanga Māori but rather to record what has at various times and in various circumstances been claimed to be custom. This extract from the *Te Mātāpunenga* section on wāhi tapu exemplifies the approach taken, with the preamble followed by seven entries selected from sources at 30–40 year intervals from among the 26 included in the 2007 draft.[119]

> **Wāhi Tapu** A place subject to serious and long-term ritual restrictions on access or use, for example the site of a battle or massacre, or an area of particular historical, ceremonial or cultural importance. Wāhi tapu include but are by no means confined to urupā (cemeteries), although the phrase is often used interchangeably with the more specific term. The word wāhi has a complicated history, derived ultimately from Proto-Malayo Polynesian *bad'i "wedge"; perhaps, fittingly, several derived meanings ("to split lengthwise", "a part or portion", and "place") converged in Māori through slightly different routes; the connotation of "place" is shared with cognate terms in Tuamotuan, Hawaiian and Marquesan. The derivation of tapu is discussed in the title for that concept.
>
> [#WAH 02] In a letter to Rev. Joshua Mann of 14 July 1817, Thomas Kendall, a scholar and keen student of Māori language and customs, and one of three agents of the Church Missionary Society established at the Bay of Islands by Rev. Samuel Marsden, offered some advice to would-be settlers:
>
> > "In selecting a portion of land for a settlement, it would be advisable to take care that it be as clear as possible of what the natives call the wahhe tabboo (wāhi tapu). Wherever a person has breathed his last, or his bones have been laid for a time, there is always a piece of timber set up, if there is no tree growing to perpetuate his memory. The wahhe tabboo is not suffered to be molested, and is held sacred both by friends and strangers. Amongst the natives, the least disrespect paid to their sacred relics or religious ceremonies and customs is considered a sufficient ground for a war by enemies and for a public debate by friends." Elder, J. *Marsden's Lieutenants*, (Dunedin, A. H. Reed. 1934) p. 140.
>
> [#WAH 06] In a Journal entry dated 5 June 1845 the missionary Thomas Chapman recorded that a road had been placed under a tapu for five months as the result of an axe being stolen from a burial ground near that road. Korokai,

119 Used with permission of the Editorial Board.

a prominent chief, was accompanied by Chapman to seek the lifting of the tapu as he required the road to drag two large canoes out to sea. Korokai's local influence was evident:

> "Korokai replied … there were many hundreds who required the use of this road and his people in particular just now … take away the 'tapu' … This ended the regular part of the debate – and it was intimated that the five months would be lowered to five weeks, and this seemed tolerably satisfactory." Chapman, Thomas 1792–1876 Journal, (ATL Ref: MS-0498-0499).

[#WAH 11] Tongariro, like many other prominent landmarks, has always been regarded as a 'maunga tapu'. An editorial has described Tongariro as "Tena kei tawhiti e tu mai ana Tongariro, te maunga tapu, e kore e takahia noatia e te waewae ware, te nohoanga o te tuatara, te takotaranga o te puehu o nga tupuna rangatira kua mate atu." [In the distance is seen Tongariro, the sacred mountain too sacred for common feet to tread its Tuatara-guarded solitudes, those last resting places of the dust of chieftain]. (Te Wananga, (Vol. 1, No. 5, 16 January 1878). Hence during the 19th century, local Māori often disapproved of Europeans travelling to Tongariro:

> "A ko te Māori e riri ana ki nga Pakeha haere ki Tongariro, he tohe hoki na te Pakeha kia kite i te toitoi o Tongariro. Te take i riri ai te Māori (ara na te Māori aua kii nei) he tapu no taua wahi, a e takahi ana te Pakeha i o te Māori mea tapu. Ki te Pakeha, he whenua tonu te whenua kahore he tapu. Otiia kahore te Pakeha e puta i te Māori ki taua wahi. The Māori are angry with Europeans going to Tongariro, the European argue that they want to see the toitoi of Tongariro. The Māori believe Europeans are desecrating the sacred things of the Māori. The Europeans believe that land is just land, and not sacred. The reason the Māori are angry (that is, according to the Māori themselves), is that that place is sacred and the Europeans are transgressing the things that are sacred to the Māori. To the European land is land, it is not sacred. But the Māori will not allow the European to go to that place. 'Taupo', *Te Wananga*, (30 March 1878, Vol 5, No. 13) p. 140.

[#WAH 19] In the annual report of the Rotorua Māori Land Council to Parliament by Captain Mair, 'Nga Kaunihera Maori' (Maori Councils), attention was drawn to the annoyance and offence of local Māori with Europeans desecrating their ancient burial places. A Rotorua meeting called on the Government to protect such sites:

> "Tenei ano tetahi take e akiakina ana, ara, kia hanga be tikanga kaha hei tiaki i nga urupa me nga wahi tapu o te iwi Māori, kei tukinotia, kei takatakahia noatia e te Pakeha. He nui rawa te riri o te iwi mo tenei mahi nanakia a te Pakeha; a, te kaati mai i kona, tahuri rawa ratau ki te panui i nga whaka- hua o a ratau takaro (ki nga tapu o te Māori).

> Kua tapiritia e au te whakaahua o etahi o aua Pakeha taurekareka i roto i tetahi ana tanumanga tupapaku i Te Rotoiti, e takahi ana i te wahi i takoto ai nga toa piripono o te Arawa, i mate mo te Kuini i te pakanga o mua ake nei. Ka hapa i konei ko te Ture hei whiu i tenei tu hara. Tera ke noa atu te hamama mehemea i tupono he Māori nana i tukino tetahi urupa Pakeha, be motini kaha i oti i te hai i Rotorua, e inoi ana ki te Kawanata- nga kia tiakina o ratau tupapaku.
>
> ([Translation by Te Mātāhauariki] "Another reason they are urging that this should happen is so that they can develop a strict protocol to protect Māori graveyards and sacred sites, in case they are abused and trampled on by Pakeha. The people are very angry with Pakeha for this reckless behaviour. The conversation ended there, and they went on to read aloud the accounts of their careless behaviour (toward things sacred to the Maori). I have attached the photograph of some of those Pakeha scoundrels inside a burial plot, in Rotoiti, desecrating the resting place of close allies of Te Arawa, who died for the Queen in the war. The law is inadequate to punish this type of crime. On the other hand there would be quite an outcry if it was thought that a Māori had violated a Pakeha grave; a strong motion was passed at the meeting in Rotorua, requesting the Government to protect their dead.)" *Te Puke ki Hikurangi*, (Vol 5, Issue 14, 30 September 1903) p. 2.

[The entry goes on to quote the sympathetic comment of "A European newspaper" on this aspect of Mair's report, which concluded:]

> "… A thoughtless European, accustomed to regard his own cemeteries with every mark of respect and reverence, might readily look upon a Maori burial ground with very different feelings. The place where a white man deposits his dead has all the symbols of a place of mourning , but a Maori burial place is merely a cave full of bones—till one remembers that it is the native fashion, and is just as sacred to him as the tomb filled cemetery of the Pakeha." A-G, (28/2/03).

[#WAH 21] As part of the 1940 Centennial Celebrations marking 100 years since the signing of the Treaty of Waitangi, several Māori 'waka taua' or war canoes were constructed. The building process and the site were considered tapu. Some European observers failed to realise this as was reported in a local newspaper article. Some persons permitted themselves to be photographed sitting on the canoe to the dismay of Māori who considered such an act as desecration.

> "The canoe which the Maoris are building at Kerikeri is tapu. All Pakeha should remember this fact, especially females to whom it is doubly tapu… It seems a pity that the Maoris, in leaving the Kerikeri canoe lying about in such an open and accessible spot, did not think to indicate its untouchable character. A notice: 'This canoe is tapu,

> please do not touch' would have the desired effect. In the meantime, it is suggested that those who have violated the tapu should make handsome donations to the funds which it is proposed to organise so as to assist the Maoris in their entirely commendable work." 'The Place is Tapu', The Northern Advocate, (November 17, 1938).

[#WAH 23] Te Taou historian Colleen M. Sheffield related the historical relationship of this Ngāti Whatua hapu with the sandhills from Muriwai through to the northern stretches at Rangatira. She observed that by the time the first Pakeha came, Te Taou knew every aspect of living in the sandhills, and generations of their forbears were laid to rest in hidden burial places among the dunes. She continued:

> "In the forest and on the sand we work in harmony with men of other races who still respect our customs and wishes. The old wahi tapu are all fenced off today and left unplanted, and the seaward face of Oneonenui has been set aside as a tapu area because of the hundred Waikato who were once slain there. The future of Te Taou is ably guarded by the men of the State Forest Service." Te Ao Hou, (No. 40, September 1962) p. 46.

[#WAH 26] The issue of wāhi tapu has also frequently come before the Environment Court, particularly as a result of section 6(e). Where it has been alleged that a site is wāhi tapu, the Court has had to grapple with the meaning of wāhi tapu and how to provide for sites determined to be wāhi tapu. In *Winstone Aggregates* the Court recorded evidence of wāhi tapu from Mr Rima Herbet, the manager of the Ngāti Naho Co-operative Society Limited, who defined wāhi tapu as

> "… physical features or phenomena, either on land or water, which have spiritual, traditional, historical and cultural significance to our people. Waahi tapu as conceived by Māori may originate from pre-contact history or from post-European history through to the present day. The waahi tapu identified up until recent times by us included cultivation areas and Māori earthworks and burial areas which are all of long-standing importance to the Māori people of our area." Winstone Aggregates Ltd v Franklin District Council (AO 80/02, 17 April 2002).

In the same case, a Māori environmental consultant and former Waitangi Tribunal Director, Buddy Mikaere, giving evidence on behalf of Winston Aggregates, argued that *wāhi tapu* were very small specified places, rather than general areas.

## VII. Some Formative Conclusions

Cultures view the world differently, and valuing that difference is an important step towards understanding, acknowledging and even celebrating a Māori world-view. Unfortunately, this has not always been the case in Aotearoa and cultural misunderstanding and ethnocentrism have been the causes of much conflict throughout history from the bloody execution of the French sailors in 1772 to the contemporary legal battles over wāhi tapu today. But the Courts are moving to alleviate potential and real conflict over wāhi tapu by giving weight to Māori interpretations of these sacred sites. Consequently, wāhi tapu are accepted by the judiciary as more than just burial grounds in that there may be a variety of causes why tapu status may be given. Wāhi tapu, moreover, do not necessarily stand separate from places used for everyday life, and may sometimes be associated with secular features and values.

The common law doctrine of Aboriginal title and the Treaty of Waitangi 1840 promised the protection of Māori cultural values. Through the introduction of the concept of wāhi tapu into law, and the interpretations made by the courts, there is now formal acknowledgement that non-European concepts of sacredness are important, and an acceptance of tikanga Māori relating to wāhi tapu and other Māori concepts. These changes over the past two decades have meant that tikanga concepts such as wāhi tapu have now become widely acknowledged, even if sometimes begrudgingly.

Furthermore, wāhi tapu are not always sacrosanct – tapu status can be uplifted, and in some cases the relevant Māori community may come to an agreement as to the grounds under which wāhi tapu can be disturbed. There is scope for such a course of action both in terms of tikanga Māori (tapu lifting) and also legal precedent – thus rendering the land open for appropriate development. In other circumstances, it may be appropriate to preserve the status quo. But Māori should be making these decisions, not others.

However, while tikanga Māori values, customs and institutions have now re-entered the New Zealand legal system, there is evidence that the system may not yet have the tools or have developed a sufficiently informed approach to dealing appropriately with those values and customs. This article has highlighted some of the complexities that the Environment and High Courts are facing when attempting to incorporate and define tikanga in legislation through litigation specifically around wāhi tapu. The article highlighted two possible options to move towards a better understanding and treatment of these challenges in the legal system and society generally by involving competent

Māori in the decision-making processes and referring to the more extensive use of authoritative and well-audited tikanga Māori reference works such as the *Te Mātāpunenga* project of the Te Mātāhauariki Research Institute at the University of Waikato.

The *Te Mātāpunenga* project will prove useful to the judiciary and wider public particularly, inter alia, where challenges are located at this interface between tikanga Māori custom and State regulatory systems. Given that *Te Mātāpunenga* includes well-audited historical and contemporary research, primary and secondary and written and oral sources, it will assist with contributing to tikanga Māori debates and, more importantly, for reflecting on the best customary concepts, institutions and values of both of New Zealand's major founding cultures – Māori and Pākehā.

There still appears to be a potential for the values of the dominant society to be "regularly applied in the assessment of proposals without a thought as to their origin".[120] On the other hand, perhaps sufficient tools now exist that can be applied to address that situation and the inclusion again of tikanga Māori values, customs and institutions within contemporary New Zealand society.

Finally, this article suggests that we are well into experiencing the re-emergence of a hybrid legal system that recognises both the English legal tradition as it has developed in Aotearoa and elements of tikanga Māori. The New Zealand legal system should continue to evolve in order to accommodate the best values and legal concepts from both Māori and Pākehā cultures and communities. Māori should be open to the option of appropriate cultural change, as should Pākehā and other non-Māori New Zealanders, so that we can together create an effective legal system with sufficient flexibility and robustness to meet the needs of the citizens of Aotearoa-New Zealand in and beyond the 21st century.

> *Kāua e hokona te whenua, he mea oti tonu atu; nōku hoki te whenua; he manene hoki koutou, he noho noa ki ahau. – The land shall not be sold forever: for the land is mine; for ye are strangers and sojourners with me. – Leviticus 25:23.*

120 Waitangi Tribunal, *The Manukau Report* (Wai 8, Wellington, 1985) at 78.

## Appendix I.
## Resource Management Act 1991, sections 6(e), 7(a) and 8

**6 Matters of national importance**

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 recognise and provide for the following matters of national importance:

....

(e) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

**7 Other matters**

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 have particular regard to—

(a) Kaitiakitanga:

....

**8 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).

## Appendix II.
## Current Legislation with References to Māori Wāhi Tapu

*General Legislation*

Biosecurity Act 1993, s 57.

Biosecurity Amendment Act 1997, s 35.

Building Act 2004, s 39.

Building Amendment Act 2009, s 14.

Climate Change Response Act 2002, s 37.

Crown Forest Assets Act 1989, s 18.

Crown Minerals Act 1991, ss 17, 51.

Education Act 1989, s 214.

Fisheries Act 1996, s 121.

Hazardous Substances and New Organisms Act 1996, s 6.

Historic Places Act 1993, ss 22, 25, 28, 32, 32A, 33, 103.

Historic Places Amendment Act 2006, ss 8, 10, 13, 14, 15.

Local Government Act 2002, s 77.

Local Government Official Information and Meetings Act 1987, s 7.

Marine and Coastal Area (Takutai Moana) Act 2011, ss 78, 79.

Overseas Investment Act 2005, s 6.

Reserves and Other Lands Disposal Act 1995, s 3.

Resource Management Act 1991, ss 2, 6(1).

Resource Management Amendment Act 2003, s 3.

Resource Management Amendment Act (No 2) 2011, Schedule 2: Chapter 6: "Amendments to Waikato Regional Coastal Plan"

State-Owned Enterprises Act 1986, s 27D.

Summit Road (Canterbury) Protection Act 2001, s 5.

Te Ture Whenua Maori Act 1993, Preamble.

Te Ture Whenua Maori Amendment Act 2002, s 56.

*Legislation Affecting Specific Iwi or Māori Groups*

Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008, Preamble, s 106

Ngaa Rauru Kiitahi Claims Settlement Act 2005, Schedule 10.

Ngāi Tahu Claims Settlement Act 1998, s 196.

Ngāti Apa (North Island) Claims Settlement Act 2010, s 5.

Ngāti Awa Claims Settlement Act 2005, Preamble.

Ngāti Mutunga Claims Settlement Act 2006, Preamble.

Ngāti Rarua-Atiawa Iwi Trust Empowering Act 1993, Schedule 3.

Ngāti Ruanui Claims Settlement Act 2003, s 7.

Ngāti Tama Claims Settlement Act 2003, Preamble.

Ngāti Tūrangitukua Claims Settlement Act 1999, Preamble.

Ngāti Tūwharetoa (Bay of Plenty) Claims Settlement Act 2005, Preamble.

Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010, Schedule 1.

Pouakani Claims Settlement Act 2000, Schedule 8.

Te Roroa Claims Settlement Act 2008, Preamble.

Te Uri o Hau Claims Settlement Act 2002, Preamble, s 32.

Te Whānau-a-Taupara Trust Empowering Act 2003, Schedule 2.

Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Schedule 2: Vision and Strategy for the Waikato River.

Waitutu Block Settlement Act 1997, s 8.

# "One Law for All" – Problems in Applying Māori Custom Law in a Unitary State[1]

The Hon Justice Paul Heath

## I. Introduction

I swear that I will well and truly serve Her Majesty, Her heirs and successors, according to law, in the office of ; and I will do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will. So help me God.[2]

The judicial oath requires a Judge to do right to all people "after the laws and usages of New Zealand", without fear or favour, affection or ill will. It is inherent in the oath that the Judge will treat Māori, Pākehā and other ethnic groups equally, applying both laws and "usages" of New Zealand. When considering if it is permissible to apply Māori custom in any given setting, the Judge must consider whether it is a "usage" properly to be applied as part of the law of New Zealand.

In determining that question, a Judge must remember that there is as much a "Māori law" as there is a "Māori language".[3] The sense of identity that leads to that proposition is reflected in the whakataukī.

> E kore au e ngaro
> He kākano i ruia mai i Rangiātea[4]

In 1840, in a communication from the British Government to Governor Hobson, the Governor was instructed to recognise the customs developed by Māori:[5]

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1 I acknowledge with gratitude the considerable assistance provided by Blair Keown, Judges' Clerk, High Court Auckland, in the preparation of this paper. I have also drawn extensively, not always with attribution, from New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9 2001), to which I was a party.

2 The judicial oath. Section 18, Oaths and Declarations Act 1957. The oath, in this form, was first taken in New Zealand in 1873 in accordance with s 4 of the Promissory Oaths Act 1873.

3 Durie "Will The Settlors Settle? Cultural Conciliation and Law" (1996) 8 Otago Law Review 449 at 451.

4 I will never be lost for I am a seed sown from Rangiātea.

5 *Dispatch from Lord John Russell to Governor Hobson, 9 December 1840* (1841) 311 New Zealand Parliamentary Papers 24 cited in Frame "Colonising Attitudes Towards Maori Custom" (1981) NZLJ 105 at 105-106. Emphasis added.

> [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 …

I suggest that it is no coincidence that the word "usages" also appears in the judicial oath.

Section 71 of the New Zealand Constitution Act 1852 provided:

> 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.

However, this section was never used. It was repealed on enactment of the Constitution Act 1986. No districts were "set aside" in terms of s 71 notwithstanding the efforts of those associated with, among others, the Kīngitanga movement.[6]

Notwithstanding the promising start to the recognition of Māori customs at the beginning of European settlement, those responsible for governing the Colony after the Treaty of Waitangi was signed quickly acted to dispel the notion that Māori custom and British sovereignty could coalesce. A clear example of the growing denial of Māori custom law is found in Prendergast CJ's judgment in *Wi Parata v The Bishop of Wellington*.[7] The Chief Justice said:[8]

> … 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, since nothing could exceed the anxiety displayed to infringe no just right of the aborigines. …
>
> …

6 Joseph "Colonial Biculturalism? The Recognition & Denial of Māori Custom in the Colonial & Post-Colonial Legal System of Aotearoa/New Zealand" Paper presented to Te Mātāhauariki Research Institute, University of Waikato FRST Project, 1998 at 2 (abstract).

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

8 Ibid at 77-78 and 79-80.

> Whatever may be meant by the phrase "the persons or property, whether real or personal, of the Māori people," the next following words, "and touching the title," [etc] can only signify that the Court is enabled and required to entertain and determine questions of native title. The [Native Rights Act 1865] speaks further on of the "Ancient Custom and Usage of the Māori people," as if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being. As we have shown, the proceedings of the British Government and the legislation of the colony have at all times been practically based on the contrary supposition, that no such body of law existed; and herein have been in entire accordance with good sense and indubitable facts. …
>
> … If, therefore, the contention of the plaintiff in the present case be correct, the Native Lands Court, guided only by "The Ancient Custom and Usage of the Māori people, so far as the same can be ascertained," is constituted the sole and unappealable judge of the validity of every title in the country.
>
> Fortunately we are not bound to affirm so startling a conclusion. The Crown, not being named in the statute, is clearly not bound by it; as the Act, if it bound the Crown, would deprive it of a prerogative right, that namely of conclusively determining when the native title has been duly extinguished …

The Law Commission described the eclipse of Māori custom law:[9]

> 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.

That is the background against which it is necessary to consider what place Māori custom law continues to have (or should have) within the New Zealand judicial system.

9 New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9 2001) at 22, para 97.

## II. Parliamentary Sovereignty and the Common Law

The concept of Parliamentary sovereignty[10] means that common law development by the Court cannot conflict with the law as stated in a statute. But there appears no impediment to the development, as part of New Zealand common law, of principles that rely on Māori custom, provided they are capable of being readily identified and applied in a predictable manner. Any person ought to be permitted to organise his or her affairs in the shadow of the law; meaning that the known law is used as the framework by which the affairs are ordered. And, to do so, the terms of the law must be readily accessible.

In the criminal law there are limited opportunities to apply custom. All offences are identified by statute. The Courts that have jurisdiction in criminal proceedings and the procedures they are obliged to follow are both prescribed by statute. Those procedures recognise an adversarial contest where witnesses are challenged through cross-examination by a lawyer representing the opposing party. That procedure is inherently inconsistent with the nature of tikanga Māori.

There is room in the sentencing process to pay greater heed to cultural considerations. These will be discussed later, but include the ability to request that a person be heard on cultural or whanau issues,[11] the requirement for a Court to take account of any "offer of amends"[12] made by the offender, the possibility of the use of a restorative justice process designed to enable offender and victims to redress the wrong committed and the ability to adjourn sentencing for significant periods to permit agreed responses to be carried out by the offender.[13]

From a civil law perspective there is greater scope to apply custom. First, there is the possibility of custom being incorporated as part of a "New Zealand common law". As more Pākehā embrace Māori culture as part of their New Zealand identity, the prospects of incorporating Māori customary practices grow. A generational shift is taking place and it may be, as a generation of Pākehā more informed about Māori history and customs grow into positions of responsibility, that the best of both the Māori and Pākehā worlds can be synthesised in creating a common law that is consistent with statutory overlay. Second, there is the ability for all citizens to refer their disputes to mediation or arbitration. Where Māori parties are involved there is no reason why appropriate tikanga cannot be chosen as the method of resolving disputes.

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10 Now enshrined in s 3(2) of the Supreme Court Act 2003.
11 Sentencing Act 2002, s 27.
12 Ibid, s 10.
13 Ibid, s 25.

In contrast to the existing judicial framework (save to the extent I have identified), Māori custom law and the values which inform it serve a fundamentally different purpose and come from a different philosophical base from the laws developed since colonial government began. For the purposes of this paper, I rely broadly on tikanga Māori as a basis of Māori custom law.[14]

In 2002, after consultation with Māori, the Law Commission expressed central values that underpin the totality of tikanga Māori:[15]

- Whanaungatanga – primarily this denotes the relationships between people bonded by blood, and the rights and obligations that follow from the individual's place in the collective group.[16]
- Mana – encompasses political power, as well as authority, control, influence and prestige.[17]
- Tapu – seen as part of a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons and traditional values.[18]
- Utu – relates to the concept of reciprocity in order to maintain relationships between people.[19]
- Kaitiakitanga – relates to the notion of stewardship and protection, often used in relation to natural resources.[20]

The Commission recognised that each iwi applies variations of those values to inform their particular tikanga. Furthermore, any attempt to define tikanga must take account of tikanga tangata (social organisation), tikanga rangatira (leadership) and tikanga whenua (connections to the land).[21] The Commission also referred to whakataukī as illustrative of tikanga.[22]

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14 Although I accept the salutary caution sounded by Dame Joan Metge in directly equating tikanga with Māori custom law in New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9 2001) at 2.

15 New Zealand Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* (NZLC SP13 2002) at 9, para 42.

16 Discussed in New Zealand Law Commission *Maori Custom and Values in New Zealand Law* (NZLC SP9 2001), paras 130-136.

17 Ibid, paras 137-149.

18 Ibid, paras 150-155.

19 Ibid, paras 156-162.

20 Ibid, paras 163-166.

21 New Zealand Law Commission *Treaty of Waitangi Claims: Addressing the Post Settlement Phase* (NZLC SP13 2002) at 9, paras 42 and 43.

22 Ibid, at 9-10, paras 44-48.

Translated into the context of a dispute resolution process, tikanga Māori has no winner or loser. Nor are the relevant parties restricted to those immediately interested individuals that are accorded standing in common law legal systems. Consistent with this deeper focus, the ultimate aim of a tikanga-based dispute resolution mechanism is the maintenance and restoration of balance. Balance is to be assessed in a broad and qualitative manner.

Tikanga Māori aligns more closely with an inquisitorial model of dispute resolution where every party seeks to achieve a common and mutually beneficial goal. As a general construct, this is fundamentally at odds with the adversarial system.

This is not to suggest that there is no common ground between the two systems. Indeed, when identifying the content of the law, both have a conception of precedent. The existing judicial system relies on a written tradition. The tradition of tikanga Māori is oral. In this respect, Māori custom law and the existing common law are not fundamentally different.[23] While the values that inform it are different, their overriding function (as representing the practices of the community) is identical. Where Parliament permits (or does not prohibit) the development of common law, there is scope in theory for the development of substantive law which fuses European values and tikanga Māori.

There appear to be two principal means by which Māori custom law could be worked into the judicial system. First, the entire judicial system could be overhauled, and either parallel systems of adjudication developed or a system of adjudication developed which takes equal account of Māori custom and "European" values. Second, the existing framework could be modified, thereby permitting Māori concepts and custom to operate where appropriate.

The former option is inherently unlikely given the significant paradigm shift and attendant costs that an entirely new system would occasion. It is inconsistent with the Crown's position that Māori gave up the right to develop their own system of law with the cession of sovereignty under Article One of the English version of the Treaty of Waitangi. It is also at odds with the practical need for New Zealand law to deal fairly with all New Zealanders, whose ethnic origins have become more varied in recent years.

The Law Commission has opined that such an approach is unnecessary:[24]

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23 Though the oral tradition of Māori is more dynamic and fluid than the written English tradition which emphasises certainty.

24 New Zealand Law Commission *Justice: The Experiences of Māori Women* (NZLC R53 1999) at 120, para 424.

> Māori autonomy is not an outcome which requires Māori and non-Māori to live in separate worlds, or which permits the existence of separate legal systems or encourages defiance of the law. The future of New Zealand must lie in a single legal system which nevertheless recognises and respects Māori values, tikanga and aspirations. Indeed the common law principle of aboriginal rights already requires enforcement by the courts of such rights in the mainstream of that single legal system.

The second option, in addition to being more attractive from a resource point of view, seems to be the only option that is politically acceptable. While this could be seen as consigning Māori custom and values to a gap-filling role,[25] I am more sanguine about the prospects of producing a more substantive solution.

Blair Keown's view is that, at the level of legal process, Māori custom will be taken into account where the associated trade-off is not too great. At the level of legal content, he considers that this trade-off is not as apparent and that practical rather than theoretical difficulties hinder progress into a truly integrated common law.

I do not disagree with those underlying themes. However, I am, perhaps, more optimistic about the future.

I see greater numbers of Pākehā New Zealanders interested in issues Māori, in learning te reo and in educating themselves about customary practices. I see people born from the late 1970s striving to find identity as a New Zealander that is distinct from values derived from Britain. The increasing number of migrants from different countries has added to that. Many have, in my experience, made real efforts to learn about te ao Māori once decisions to settle in this country have been made. As time goes on, I have no doubt that a wider range of New Zealanders will embrace many Māori traditions, something that could lead to the development of a common law which will encompass cultural practices accepted by many more New Zealanders than is currently the case.

## III. Māori Custom Law in Judicial Process

At present, there is an institutional reluctance to depart from the adversarial system of justice. This reluctance is particularly acute in the context of criminal prosecutions where the adversarial process is considered integral to the notion of a fair trial. Outside of this realm there is more scope for the development

25 See Keown, "Ownership, Kaitiakitanga and Rangatiratanga in Aotearoa/New Zealand" (2006) 2 Journal of Māori Legal Writing 64.

of inquisitorial style processes. A number of statutory developments have done precisely that.[26] Yet such changes sit uneasily with the constitutional conception of the Courts as objective arbiters:[27]

> Inevitably, the investigatory function of the "court" would break down the doctrine of separation of powers and result in appellate courts becoming part of the executive branch of the State, as they effectively are in many jurisdictions that reject the adversary system of justice.

Any alteration to the existing process to take account of Māori custom will meet resistance where the criminal adversarial system is threatened. A fundamental question is whether, without overhauling the present criminal justice system completely or creating a system that provides different laws for different classes of New Zealanders, there is room for tikanga in the criminal arena.

In my view, New Zealanders generally will not accept a system whereby different laws are applied to different classes of people. If any suggestion were to threaten the existence of New Zealand as a multi-cultural society, that proposal is likely to top the list. It is an idea which overlooks the interaction that necessarily occurs between different ethnic groups; if there are laws for Māori and other laws for other New Zealanders, what happens when the two collide? Which law prevails? Indeed, how can two legal systems founded on race and culture be justified on a principled basis?

Nevertheless, there are considerable advantages in having legal processes based on Māori custom law. It gives Māori ownership of a system with which they are more likely to identify,[28] accords with Treaty principles of participation and partnership,[29] complies with Article Two of the Māori version of the Treaty and contributes to a genuine sense of cultural identity.[30] Given the regrettable

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26 See for example the establishment of the Employment Relations Authority under the Employment Relations Act 2000 commented on in *Claydon v Attorney-General* [2002] 1 NZLR 130 (HC) at [16]. See also family law processes under the Guardianship Act 1968 and the Care of Children Act 2004. The former was the subject of consideration in *Y v X* [2003] 3 NZLR 261(HC) at [58].

27 *Gipp v R* (1998) 155 ALR 15 (HCA) at [55] per McHugh and Hayne JJ.

28 New Zealand Māori Council and Durie Hall "Restorative Justice: A Māori Perspective" in Bowen & Consedine (eds) *Restorative Justice: Contemporary Themes And Practice* (1999) 25 at 28.

29 New Zealand Law Commission *Justice: The Experiences of Māori Women* (NZLC R53 1999) at 6.

30 New Zealand Law Commission *Justice: The Experiences of Māori Women* (NZLC R53 1999) at 8.

fact that Māori represent a significant proportion of those involved in the criminal justice system,[31] the case for greater Māori input into legal process is compelling.

There are a number of processes based on Māori custom law which do not pose a threat to the adversarial criminal justice system. The ability to address the Court in Māori,[32] of kaumatua to address the Court in a pre-trial proceeding,[33] and the wider acceptance of Māori protocol in Court proceedings have no substantive impact on the adversarial contest. By and large such practices are permitted to occur in Court.

A recent example from the High Court occurred early in 2007 at the conclusion of an intra-family rape trial.[34] Upon the guilty verdicts being delivered, the victim's family rose and delivered a challenge in te reo to the prisoner. Registry staff immediately leapt to their feet to quell the disturbance. One member of the Court staff calmly explained the purpose of the process and the cathartic effect it would have on the family. The Judge permitted it to continue.

Extending purely procedural involvement to Māori without anything further risks criticism on the grounds of paying lip service to Māori custom by permitting input where it is easy. The true acid test lies in the extent to which the adversarial parts of the criminal justice system (the trial phase) can accommodate Māori customs and values.

Moana Jackson has mounted a strong argument in favour of Māori custom playing a greater role in legal process.[35] In his report to the then Department of Justice, the author critically examined the various institutions of the legal system as they impact upon Māori. Among his many recommendations was a call for a parallel criminal justice system for Māori:[36]

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31 In 2004 47 per cent of convictions for violent offences and 43 per cent of all convictions were attributed to Māori. This compares with 38 and 45 per cent respectively for New Zealand Europeans. See Soboleva, Kazakova & Chong *Conviction and Sentencing of Offenders in New Zealand 1996 to 2005* (December 2006) at 54. Given that the Māori population is projected to reach 810,000 by 2026, this presents a formidable problem. See Statistics New Zealand *National Ethnic Population Projections* 2006 (base) – 2026 update. Available at http://www.stats.govt.nz/browse_for_stats/population/estimates_and_projections/NationalEthnicPopulationProjections_HOTP2006-26.aspx (last accessed 7 November 2011).

32 Section 4, Māori Language Act 1987.

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

34 For the sentencing notes see *R v Shepherd* (HC Auckland, CRI 2005-090-000950, 28 February 2007, Andrews J).

35 Jackson *The Māori and the Criminal Justice System Part Two* (November 1988).

36 Ibid, at 277-278.

> The aim of a Māori system would not be to simply transplant the Pākehā organisation into a Māori context, but to develop a structural framework which reflects the imperatives of Māori law and the processes it developed for maintaining order. The runanga concept consisting of selected people rather like the committees envisaged under the reform of the Māori Community Development Act would be one obvious structure. The idea of a panel rather than an individual is important as it would stress the community responsibility to remedy wrongs committed against it. However … runanga would have power and authority to hear and determine all cases involving offenders and victims who identify as Māori. The attribution of guilt or innocence and the determination of reparation or other sanction would be within its jurisdiction. If a victim was non-Māori, or an institution as distinct from a person, jurisdiction would be varied in the sense that the victim would have the right to have the matter heard within the Māori system or referred to Pākehā courts.
>
> Once the alleged wrongdoer and his whanau met with the runanga, the aim of the hearing would also be quite different. Under Pākehā notions of criminal jurisprudence, the objectives are to establish fault or guilt and then to punish. The sentencing goals of retribution, revenge, deterrence, and isolation of the offender are extremely important, although the system often pays lip service to the idea of rehabilitation as well. A Māori system would endeavour to seek a realignment of those goals to ensure restitution and compensation rather than retribution; to mediate the case to everyone's satisfaction rather than simply punish. Of course, sanction to express community disapproval would necessarily be a part of the process, but the method and type of sanction would be shaped by traditions other than the need to further alienate an offender from his community. Implicit in the process of mediation is concern for the victim and the victim's whanau. While the redress and restitution available would be defined according to each offence, the [aggrieved] whanau would have the right to contribute to its determination in any particular case. The end result would be a settlement and sanction that would not necessarily be any more harsh or lenient than those imposed by the Pākehā system, although the method of its imposition and fulfilment by the defendant would clearly be different.

As Jackson acknowledges, there is little obstacle to a parallel system where: [37]

(1) the offender is Māori;

(2) the victim is Māori; and

(3) there is no dispute as to guilt.

In such circumstances the system operates for the sole purpose of formulating a response to the proven offence. The adversarial phase of the criminal justice system is bypassed. Guilt having been determined, the underlying need for an

37 Ibid, at 217.

adversarial process is removed. Necessarily, the sentencing process is more inquisitorial in nature; it is for the Judge to impose an appropriate sentence to reflect the seriousness of the offending and the wrongs done to the victims and the community generally. Further, at least since passage of the Sentencing Act, the ability to sentence in a manner that reflects cultural background has been recognised.

One important point, however, is the need to bear in mind that serious criminal conduct (eg sexual violation, wounding with intent to cause grievous bodily harm, manslaughter and murder) are offences to which important sentencing goals of accountability,[38] denunciation[39] and deterrence[40] must apply. There is less room for more lenient sentences to be imposed for serious offending through operation of a parallel sentencing regime that lacks institutional safeguards. Consistency is important.

The availability of Māori-focused restorative justice programmes[41] demonstrates the digestibility of Māori custom in this area and an initial acceptance that the trade-off to the adversarial system in these circumstances is not too great. Section 10 of the Sentencing Act 2002 provides a direct legislative pathway for muru[42] or ifoga[43] to be accorded judicial recognition by permitting a Court to take offers of amends into account at sentencing. The Māori Community Development Act 1962 permits Māori committees to impose penalties on Māori for certain conduct falling within the Summary Offences Act 1981. The Children Young Persons and Their Families Act 1989 provides for family group conferences to address youth offending which can be held on marae, with Māori facilitators and kaumatua present.

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38 Section 7(1)(a), Sentencing Act 2002.

39 Section 7(1)(e), Sentencing Act 2002.

40 Section 7(1)(f), Sentencing Act 2002.

41 See for example, Te Whanau Awhina referred to in Maxwell and Hayes "Restorative Justice Developments in the Pacific Region: A Comprehensive Survey" (2006) 9(2) Contemporary Justice Review 127 at 131-133 Available at ips.ac.nz/events/downloads/PacificCJR.G%20 Maxwell.pdf (last accessed 7 November 2011) and Tomas & Quince "Māori Disputes and their Resolution" in Peter Spiller (ed) *Dispute Resolution in New Zealand* (Oxford University Press, Auckland, 1999) 205 at 225-226; and Te Oritenga referred to in Quinn and Bowen "Restorative justice in New Zealand" in (1997) 486 *Lawtalk* 34 at 35-36.

42 The taking of personal property as compensation for an offence against an individual, community or society. For a general discussion of muru see Ministry of Justice *He Hinatore ki te Ao Maori – A Glimpse into the Maori World: Maori Perspectives on Justice* (Ministry of Justice, Wellington, 2001) at 75-79. For an historical account of muru see Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 151-164.

43 A ceremony in which an apology in the Samoan way is offered. For an in-depth discussion of ifoga see Tuala-Warren "A Study in Ifoga: Samoa's Answer to Dispute Healing" (2004) 4 Te Matahauariki Institute Occasional Paper Series.

However, institutional acceptance has its limits. Restorative justice mechanisms that incorporate Māori custom are generally restricted to either youth offenders or relatively minor offences. That is consistent with the notion that the more serious the offending the greater the public interest in subjecting offenders to the generic sentencing process. The more serious the offending, the more difficult it is to make a case for a parallel sentencing process relevant only to one sector of the community.

This response is reflected in the attitude of the High Court and the Court of Appeal, at the level of serious offending, to both Māori restorative justice measures and Samoan practices of ifoga. While the Courts have been willing to treat a concluded hui at which a full apology was proffered[44] and an accepted ifoga[45] as a mitigating factor at sentencing, they have rejected both as representing a complete punishment. In *Talataina*, the Court of Appeal expressed itself as follows:[46]

> … The law of New Zealand must be administered in the interests of our society as a whole. The Court must therefore give weight to the difference in the emphasis that this society places on certain types of conduct, perhaps on sexual crimes in particular.

I have touched on the difficulties inherent in devising a parallel criminal trial system. According to tikanga, where liability was denied, investigation into crimes would be conducted openly by iwi and hapū. Offenders could defend themselves and call witnesses. From this dialogue of accusation and investigation[47] would come a decision. Penalties were delivered quickly with no right of appeal. Would all Māori charged with offences be prepared to accept such a diminution of rights afforded by the New Zealand Bill of Rights Act 1990[48] or the procedural safeguards of an adversarial system?

Judges have not been prepared to permit custom law to intrude into a trial process; for example, a case involving the rejection of a request for a jury comprising six Māori and six Pākehā members,[49] an application for a father to defend his son in accordance with Māori custom,[50] an application for a trial to take place on the accused's marae,[51] and, more drastically, an application

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

45 *R v Maposua* (CA131/04 3 September 2004); *R v Talataina* (1991) 7 CRNZ 33 (CA).

46 *R v Talataina* (1991) 7 CRNZ 33 (CA) at 36.

47 Known as whakawa.

48 For example, the right to a fair trial and the need for a Court to comply with the principles of natural justice: see ss 25 and 27, New Zealand Bill of Rights Act 1990.

49 *R v Pairama* (1995) 13 CRNZ 496 (HC).

50 Ibid.

51 *Rameka v Police* [2000] DCR 166 (DC); *Clarke v Police* (DC Kaitaia, CRN 5029004943, 15 March 1996, Judge MF Hobbs).

for the applicant to be tried by her own people in accordance with tikanga.[52] The more general attack on the jurisdiction of "Pākehā" Courts has also (necessarily) been roundly rejected.[53]

In the civil context, there is more room to accommodate cultural needs where the parties share a cultural identity. It is open to parties to a civil dispute to resolve their conflict outside of the State-provided Court system.[54]

By way of example, I have conducted a sitting of the High Court at Maungarei Marae. As one participant has put this sitting into the public domain (by letter to the Editor of the *New Zealand Herald*) I can give some detail of what occurred. There have been disputes over the governance of a trust involved in making Treaty claims on behalf of an iwi. There are disputes between hapū affiliated to different marae over who should be trustees of the trust.

This was not a readily justiciable issue. I said I would hold a settlement conference on the marae to see if resolution could occur in that setting. As one would expect, a full and frank exchange of views ensued, though in the nature of things it was difficult (and proved impossible) to enforce the usual restriction on general publication of what occurred at a settlement conference. Plainly, once the people participated word spread of what occurred.

Settlement was not reached but I was left with the impression that each side understood the other's position better.

On a similar note, the Law Commission's proposal for re-establishing tribal organisations for Treaty settlement purposes through a specifically tailored Māori entity represents a positive step in the direction of Māori customary process.[55] The requirement that disputes within the entity be subject to an

52 *R v Knowles* (CA146/98 12 October 1998).

53 For example, see *R v Mitchell* (CA68/04, 23 August 2004) and *Barrett v Police* (HC Hamilton, CRI 2003-419-64, 14 June 2004, Randerson J).

54 For example, Arbitration (Arbitration Act 1996) and the process of mediation, through which an independent facilitator assists the parties to reach resolution.

55 This proposal was first mooted in New Zealand Law Commission *Treaty of Waitangi Claims: Addressing the Post Settlement Phase* (NZLC SP13 2002) and developed under the leadership of Hon ET Durie in New Zealand Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92 2006).

internal dispute resolution mechanism,[56] coupled with the emphasis on Māori autonomy,[57] suggests that there is scope for yet greater inroads to be made into the civil adversarial system.

The *Waka Umanga* proposal progressed in Parliament only to the Committee stages;[58] however, it at least provides a blueprint for how the development of autonomous systems of customary dispute resolution can be undertaken.

The one remaining difficulty in the civil context concerns the amenability of disputes, involving Māori as one party and non-Māori as the other, to resolution according to tikanga.[59] At present it seems inconceivable that a civil dispute in these circumstances could, ordinarily, be resolved in this manner. The interests of certainty would prevent the Court from countenancing the possibility.

At the same time, there is nothing to prevent parties, particularly in the context of commercial relationships, from regulating that relationship according to a contract which submits all disputes to resolution according to tikanga. Certainty and institutional respect for freedom of contract would prove unlikely allies for Māori custom in this area. The necessary consequence is that the existence of tikanga and Māori customary process would become entirely dependent on recognition by a "common law" construct – the contract.

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56 New Zealand Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92 2006) at 17. One possibility ventilated by the Law Commission was the appointment of a kairongomau (peace-maker) who would act in a similar way to an ombudsman.

57 New Zealand Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92 2006) at 67-68.

58 See the Waka Umanga (Māori Corporations) Bill, introduced on 21 November 2007 and reported back from the Maori Affairs Select Committee 8 September 2008; also Hon Taihakurei Durie's paper in this volume. The text of the bill as introduced is available at www.legislation.govt.nz/bill/government/2007/0175/8.0/DLM1057730.html, and the amended version reported by the Select Committee can be found at www.legislation.govt.nz/bill/government/2007/0175/latest/DLM1057730.html.

59 Initially disputes between Māori and early settlers were resolved on Māori terms. See for example Paul Moon and Peter Biggs *The Treaty and its Times* (Resource Books, Auckland, 2004) at 55; Alan Ward *An Unsettled History: Treaty Claims in New Zealand Today* (Bridget Williams Books, Wellington, 1999) at 9; and Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at 83.

## IV. Some Closing Observations

Outside the ambit of a restrictive statute, custom law can play a meaningful role. After all, custom has historically been a basis of law for all people: the common law reflects society's common customs and values. As the author of *Salmond on Jurisprudence* records:[60]

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

In a modern context, custom law can provide the content of standards, like due care and reasonableness, used in areas in which the variety of circumstances and competing policies are such that no set of general rules is likely to be satisfactory or even workable.[61] It can supply the basis for the implication of a term into a contract.[62] It can provide the basis of title in land.[63] It can assist in the definition of a statutory concept.[64] It can form the basis of fishing rights.[65] The common theme running through each of these functions is that all are of a gap-filling nature. The logical implication is that custom law cannot stand *alone* as an outlying source of law. It must be accommodated within the existing legal framework.

There appears to be no reason why Māori custom cannot fulfil similar roles. In practice, however, the judiciary has been more circumspect. The notion that custom law must accommodate the existing legal framework appears to have manifested itself in a judicial tendency to either err on the side of not giving full recognition to custom or to look to Parliament to resolve any uncertainty.

In New Zealand, as in England, a lawfully recognisable custom must possess four essential attributes:[66]

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60 PJ Fitzgerald (ed) *Salmond on Jurisprudence* (12ed, Sweet and Maxwell, London, 1966) at 189-190.

61 RM Unger *Law in Modern Society* (Free Press, New York, 1976) at 55.

62 See *Engineering Dynamics Ltd v Norgren Martonair (NZ) Ltd* (1996) 7 TCLR 369 (CA).

63 See *Attorney-General v Ngati-Apa* [2003] 3 NZLR 643 (CA).

64 For example, the meaning of kaitiakitanga under s 7, Resource Management Act 1991.

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

66 *Knowles v Police* (1998) 15 CRNZ 423 (HC) at 426. See also *R v Iti* (CA267/06 4 April 2007) at [47].

> It must be immemorial; it must be reasonable; it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain, and the persons to whom it is alleged to affect; and it must have continued without interruption since its immemorial origin. The custom must be clearly proved to exist, and the burden of proof is on the proponent.

These four requirements impose significant constraints upon the recognition of custom. They also throw up a number of practical difficulties. How long is immemorial? Against what culture's standard of reasonableness is the custom to be assessed? Will a custom, given its dynamic and fluid nature, ever be certain? Does the custom have to be practised in a completely unchanged and static manner?

The tendency to subject custom to such tight and yet vague legal controls[67] reflects an institutional unwillingness to "let go" and forgo any substantive control over customary law. As Hammond J, delivering the judgment of the Court of Appeal, recently stated in *R v Iti*:[68]

> There has to be some ability to limit rights based on aboriginal custom, as occurs in other rights-based areas of the law, where necessary, otherwise some features of Māori custom which would today be considered untenable might be enabled to continue unabated.

This timidity is evident in decisions of the High Court and Court of Appeal concerning customary adoption,[69] the ability of non-Māori to inherit Māori land,[70] and the ability of whāngai to inherit from a deceased's estate.[71] It is, however, understandable.

First, Māori custom law is not easily reconciled with the existing framework. The former comprises a plethora of norms which enables participants to call upon those which best fit the moment. The latter centres upon single rules which are of general application. This abundance of norms appears to have troubled Paterson J in *Re Walker*. In rejecting a submission that a whāngai who has the right under tikanga for maintenance and support should be considered a claimant under the Family Protection Act 1955, his Honour remarked:[72]

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67 However, these four requirements do not appear to have been applied religiously.
68 *R v Iti* (CA267/06 4 April 2007) at [46].
69 *B v Director-General of Social Welfare* (1997) 15 FRNZ 501 (HC).
70 *Grace v Grace* (1994) 12 FRNZ 614 (CA).
71 *Re Walker* (2002) 22 FRNZ 11 (HC).
72 *Re Walker* (2002) 22 FRNZ 11 (HC) at [16].

> If a whangai is capable of being a child of the deceased for the purposes of s 3, it would, in my view, be necessary for the Court on each application by a whangai to consider the relationship in some detail to determine whether or not the whangai was a person entitled to maintenance and support.

Difficulties are revealed further when the values underpinning a particular custom run contrary to the values that inform the "English" equivalent.[73] Put another way, reluctance to apply custom law is at its greatest when the custom and values underpinning it are foreign to the judicial officer who is asked to apply the custom.

Second, it is my view that a critical difficulty facing the judiciary in applying substantive Māori custom law lies in their lack of understanding of Māori culture. How can an accepted custom be proved? And by whom? As the Law Commission lamented in 2001:[74]

> 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.

One facet of this "misunderstanding" is the fact that most of the judiciary are not bilingual. A lack of fluency in Māori becomes problematic when Judges are called upon to consider and apply Māori concepts in statutes. In applying such a concept, a non-bilingual judge must, first, identify the English equivalent and, second, identify the incidents of that concept in terms of English understanding. This two-pronged process divorces the concept from its philosophical and cultural base[75] and often removes much of its integrity.

Even a completely bilingual Judge must be aware of the broader experiences and the intricate patchwork of relationships from which tikanga stems. An understanding of a concept is incomplete without an awareness of this additional dimension. Judges are often ill-equipped to comprehend the magnitude and depth of what an ostensibly simple Māori concept can encapsulate.

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73 See J Zorn and J Care "Barava Tru: Judicial Approaches to the Pleading and Proof of Custom in the South Pacific" (2002) 51 ICLQ 611, 614.

74 New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9 2001) at 4.

75 Tomas "Implementing Kaitiakitanga under the RMA" (1994) 1 NZELR 39.

However, like a lack of fluency in Māori, this is not an incurable defect. Experts can be and often are provided from the relevant hapū or iwi to provide an instructive commentary of a specific concept, practice or custom, how it has evolved and the regional variations or kawa of the particular social group that practises or uses it.[76]

This too involves perceived difficulties. In a speech delivered on 15 April 2004 to the Australasian Law Reform Agencies Conference, former MP Stephen Franks posed a cascade of difficulties in applying substantive custom law in this area. Three are relevant for present purposes:[77]

- How can we test those who claim to know it?
- How can we know they are not just making it up?
- How can we make sure it is not being stated to suit the personal and political interests of those who claim to know it?

These difficulties stem in part from the fact that, in New Zealand, custom is generally not recognised as a free-standing source of law in its own right.[78] As a result, questions of custom fall to be determined as questions of fact, leaving the Court heavily reliant on the expert witnesses produced by the parties. This is particularly so where there are two competing accounts of custom.

There is a risk that reliance can translate into vulnerability where the adjudicator is not versed in tikanga, te reo or Māori culture. Knowledge of any of these three disciplines provides a basis against which to test the evidence of those who purport to be experts in a particular custom. However, where the contrary applies:[79]

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76 Other alternatives identified by the Law Commission include multi-judge panels, customary assessors, reference to a specialist court, and appointment of amicus to assist the Court. See New Zealand Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17 2006) at 197-202.

77 Franks "Going Native: What Indigeneity Should Look Like in the Morning" (paper presented to Australasian Law Reform Agencies Conference, Wellington, 15 April 2004) at 2-3. The author identifies three other difficulties, namely: (1) What is it?; (2) Where is it looked up?; and (3) Who knows what it is if it cannot be looked up? Defining custom law and identifying its sources are beyond the scope of this paper. In any event these questions can be answered by, first, accepting tikanga as a basis for Māori custom law and, second, acknowledging that tikanga is transmitted via an oral tradition.

78 As compared to the Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Samoa, Solomon Islands, Tokelau, Tuvalu and Vanuatu which all recognise custom law as a source of law in its own right.

79 Durie "Custom Law: Address to the New Zealand Society for Legal and Social Philosophy" (1994) 24 VUWLR 325, 326.

> The presentation of generalised opinions by Māori elders and scholars not experienced in legal analysis … leaves the ultimate interpretation to untrained adjudicators without access to a coherent lego-anthropological text.

Cultural inexperience can have two unwanted consequences. It can result in adjudicators being improperly swayed to an erroneous conclusion on the back of a party's misuse or manipulation of custom.[80] Alternatively, and more likely, it can entrench judicial mistrust of custom and foster an unwillingness to be receptive to customary practice.

Finally, the fact that Māori custom, being transmitted orally, is infrequently written down represents a key challenge to the existing system.

These represent just some of the practical difficulties of application of custom law rooted in a fundamentally different cultural world. Defensiveness is a natural response to an unknown situation. That applies just as equally to Māori who come before the existing Courts as it does to Judges who have little (if any) experience or knowledge of tikanga.

Education and intellectual flexibility are key allies in the challenge to apply custom. Greater understanding is likely to breed confidence. With education, understanding and confidence on the part of all participants, it may be possible to find a significant place for Māori within the New Zealand judicial system. But it will be a significant challenge to do so.

80 For an example of custom being used for an improper motive see *Department of Conservation v Tainui* (DC Greymouth CRN 8018003265-6 4 November 1998 Judge GS Noble).

# Custom and the Native Land Court

Dr Grant Young

The Native Land Court, established in the midst of armed conflict between Māori and the Crown, was designed to provide stable title to land which could be alienated by purchase. The Crown had found it increasingly difficult to resolve customary disputes in its land purchase activities and extinguishing customary title was a problem as disputes about who had the right to sell became more common. For Māori, resolutions of disputes based on competing interests in land were always dealt with by negotiation. Whether it was rangatira sitting as a rūnanga to resolve a dispute among whānau, conflict involving taua over the use of resources or peace negotiations between iwi to establish or re-establish stable relationships, the outcome was always one negotiated by the people who lived on the land and used the resources. This did not occur in a vacuum. There were processes for dealing with the issues and power relationships were always a key feature. The resolution of particular customary disputes developed over time based on history as groups with distinct identities derived from their individual whakapapa passed on traditions which informed their relationships.

In this paper I discuss custom and the Native Land Court from an historical perspective. For those hoping for a clear definition of custom which can be applied in a modern jurisdiction, or even an effective method for settling any customary dispute over land, this paper will be fundamentally unsettling. I am going to develop three key points:

- There are no external objective criteria against which claims to land based on custom can be assessed;
- Any decision to exclude particular kinship groups or tribes is always arbitrary – a political decision made because a decision has to be made;
- Customary interests in land are primarily about relationships between different kinship groups within tribes and between tribes.

To develop these three points, I am going to draw particularly on recent and ongoing research during which I have examined thousands of pages of evidence and hundreds of decisions of the Native Land Court and Native Appellate Court, research undertaken before and since in working with claimant groups to prepare historical evidence on their claims in the Waitangi Tribunal and the report of the tribunal on the Tāmaki Makaurau settlement

process[1]. The inquiry and the tribunal's criticism of the process adopted by the Crown was an important turning point for treaty settlement negotiations in Tāmaki Makaurau and the Crown has subsequently adopted a more inclusive approach. I participated in the inquiry as a witness and I prepared independent evidence for one of the applicants, the Marutuahu Confederation, with Michael Belgrave. The urgent inquiry followed the Crown's decision to enter into an agreement in principle (AIP) with the Ngāti Whātua o Ōrākei Trust Board early in 2006. The AIP raised some particular issues about the way officials in the Office of Treaty Settlement had considered and dealt with questions of customary interests. These were explored in our evidence and considered by the tribunal in its reports and the findings are very significant. I will deal with these in the second half of the paper but will start with a discussion of Norman Smith's four take[2] and the practice of the Native Land Court in the nineteenth century.

The Ngāi Tahu decision of the Māori Appellate Court[3] was a response to a question stated by the Waitangi Tribunal regarding the boundary between Ngāi Tahu and its northern neighbours. The issue to be determined was defined by the Court and the parties to the litigation as one of customary rights to land. Significantly, the Tribunal in its stated question defined these rights as an archaic and historical entity fixed in time. The boundary could be determined as at the dates of the Kaikoura and Arahura deeds of purchase and that was the boundary for all time. To find the answer, the Court decided it first had to determine what those take were and briefly stated it found four take which the "pre-European inhabitants of New Zealand had, over many centuries, developed certain customary take or rights concerning land." They were discovery, ancestry, conquest and gift. Each of these take had to be supported by some form of occupation. The take were absolute and unchanging, except for the right to conquest which was limited by the Treaty of Waitangi. In essence, to resolve the competing claims regarding the location of the boundary, the three judges reached for their Norman Smith. They recognized the importance of their decision as it was the first case to be determined under the new legislation but, at its most basic, the Ngāi Tahu decision gave judicial authority to Smith's model of take.

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1 Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Repor*t (Waitangi Tribunal, Wellington, 2007).

2 *Native Custom and Law Affecting Māori Land* (Māori Purposes Fund Board, Wellington, 1942).

3 4 South Island Appellate Court Minute Book 672 (1990); *Waitangi Tribunal Ngāi Tahu Report 1991* Volume 3, Appendix 4 at 1122-1145 (Brooker & Friend Ltd, Wellington, 1991).

In 1942 Norman Smith codified the rules used by judges of the Native Land Court[4] to determine according to Māori custom and usage who owned land held under customary title. Ironically, by then such codification did not really matter in terms of the Court's practice. Its primary role was no longer the investigation of title to customary land as it had become part of a large and rapidly growing bureaucracy which administered the land remaining in Māori ownership. Applications for title investigations were received infrequently and the area of land affected was quite small. The model of take developed by Smith therefore was produced as an abstraction rather than as a product of the Court's practice. If in practice Smith's codification was of limited significance, it has had a major impact on the way in which historians have considered the activities of the Court. His antecedents are difficult to determine for Smith does not provide any indication, other than statute or a few of the Court's decisions, of the authority on which his views are based. Although he does acknowledge the assistance and authoritative knowledge of Robert Noble Jones, a former Chief Judge of the Native Land Court, it is far from clear how Smith arrived at this particular model of take.

Smith acknowledged that it is "somewhat difficult to elaborate the rules governing that question".[5] Even if the Native Land Court had established the grounds on which rights to customary land could be claimed, the question was not, it would seem, easily answered. Nevertheless, Smith identified four principal take recognized by the Court when considering the applications of Māori claimants to customary land: discovery, ancestry, conquest and gift. Along with these four take there was the essential requirement of occupation "or the exercise of some act or acts indicative of ownership in order that the claims made might be deemed well grounded and effectual".[6] Some form of occupation based on one of the four take was required to prove any claim conclusively and Smith went on to describe in considerable detail the degree of occupation required to support a right. To illustrate these points and discuss the four take further, he drew on Fenton's *Important Judgments*[7], Alexander Mackay's *Opinions of Various Authorities*,[8] and several decisions of the Native Appellate Court.

4 *Native Custom* … Above, n 2.
5 *Native Custom* … Ibid, at 47.
6 Ibid, at 48.
7 F D Fenton *Native Land Court Important Judgments Delivered in the Compensation Court and Native Land Court 1866-1879* (H Brett, Auckland, 1878).
8 Alexander Mackay *Opinions of Various Authorities on Native Tenure* (Government Printer, Wellington, 1890).

Although Smith acknowledged the complexity of the issue, he came up with four clearly defined and unambiguous take used by the Court to determine ownership of customary land according to Māori custom and usage. His antecedents however are not easily located. Certainly, his account was not a result of a comprehensive and systematic assessment of the decisions of the Court. And there is also no indication as to why he chose 1895 as the year when Māori custom and usage was clearly defined.

Where did Smith find his four take? That is a question which is very difficult to answer. One possibility was *Important Judgments*, the collection of decisions of the Court printed by direction of the first Chief Judge, F.D. Fenton, in 1879.[9] However, apart from vague references to conquest, ancestry and occupation the judgments provided very little indication as to the grounds on which the Court determined according to Māori custom and usage ownership of customary land. Fenton's focus was apparently on preserving an historical record of Māori – one which was determined by judges too, not Māori claimants – rather than creating a body of legal precedent for the purposes of regulating the operation of the Native Land Court. For an overview of the Court's approach to Māori custom and usage in the 19th century, *Important Judgments* provides few insights. Smith quotes from them, but the decisions would have provided little assistance in determining the Court practice.

So, *Important Judgments* is not particularly useful. Mackay's *Various Opinions*[10] may have been a little more useful. This was a collection of extracts from papers and correspondence published in March 1890, containing the views of a range of colonial officials, missionaries, soldiers, Māori leaders and judges on the question of Māori customary rights to land. Extracts from papers and letters written by several Native Land Court judges and a memo from a group of assessors were also included. Of the documents included, only Maning's letter to Fenton in November 1877 directly addressed the question of determining customary rights to land. Long and rambling, it was full of complaints, especially of "the impossibility of doing what is really the reduction of an unwritten, and in some degree still disputed, law to writing".[11] His account of Māori customary land ownership focused on original discovery and subsequent conquests. Gifting, usually as a result of support in war, was also recognized as a valid title by Maning. His principal conclusion regarding customary rights to land was that rights to land had to be maintained by force. But in general he had "never been able to fix upon any established principle

9 Above, n 7.
10 Above, n 8.
11 Ibid, pp 17-21 at 17.

for my guidance".[12] He simply dealt with the circumstances of each case "in the best manner I could". Where there were still questions, "natural equity" was used to resolve them.

Mackay himself attempted to provide some sort of synthesis on the question of Māori customary rights to land. He too sounded a warning: "the opinions expressed in the aforesaid papers are very conflicting on many points" but believed there was a "general consensus of opinion". [13] Rights were based on either ancestry through possession of land over several generations or land was acquired by conquest, occupation or gift. Mackay's approach to occupation was very similar to that of Smith:

> possession of land, even for a number of years, did not confer a right unless the occupation was found on some previous *take* of which the occupation could be regarded as a consequence, and this *take* must be consistent with the ordinary rule governing and defining Maori customs.[14]

Mackay concluded that it was "almost impossible to lay down any fixed rule for fully defining the law of Māori land-tenure, as the customs vary in different localities". He added nevertheless that his general principles were those usually accepted by the Native Land Court. Perhaps, though, Mackay's concluding comments are the most significant. Like Maning, he believed fixed rules were difficult to define and where disputes could not be resolved, judges had to fill the holes with "equity": their own opinion or "good conscience" based on the particular circumstances. The Court's practice appears much less clear than Smith's four take would suggest. Smith had three other accounts written by judges of the Native Land Court in the 20th century to draw from as well. When comparing Smith to these models, however, similar inconsistencies over the definition of take emerge. What is striking about them is the extent to which each of these models differs in quite fundamental ways, especially in relation to its definition of what the basic take were. Smith had several different models of Māori land rights from which to draw and none provide a coherent definition of take.

How did the Court deal with Māori customary interests in land? The minutes of hearings and decisions of the Court are recorded in detail in several thousand minute books. After examining a sample of more than 250 title investigations, rehearings and appeals, I have found that rather than imposing a clearly defined model of take or Māori customary interests in land on claims, judges and assessors deployed a range of strategies appropriate to the circumstances of the particular case they were dealing with. For example, they might focus

12 Ibid at 21.
13 Ibid at 1.
14 Ibid.

on occupation at a certain period (though not necessarily at the time of the hearing or 1840), they might seek inclusiveness and accept that all competing claimants had an interest or they might assess the credibility of the evidence given by a particular witness and in particular assess its consistency at that hearing and in relation to other hearings for adjacent land. Certainly, over time Court decisions grew considerably in length as the disputes become increasingly complex and difficult to resolve. The Court was forced to find ways to deal with the mass of evidence accumulated during hearings to determine the Māori owners of a block of land. As I said at the start of this paper, the Court's role was to provide a stable title which could be alienated. Failure to properly consider the matters put to it by the parties would lead to further litigation and prevent alienation.

What is clear is that the Court had no model or system of take which was applied to its decisions. Judges and assessors might draw on earlier decisions of the Court but they did so selectively and there was no attempt to create a body of precedent. The vast majority of Court decisions remained buried deep in the bound volumes of minutes. Deciding the interests of parties was a complex process and the strategies applied to do so depended on the nature of the individual circumstances. There were no clear and fixed rules defining take and when they might apply to certain circumstances. Take were certainly not a model which was simply applied to a block of land; the diverse and numerous narratives presented by Māori witnesses rendered this approach entirely impossible.

Smith codified the practice of the Court by imposing 20th century order retrospectively on 19th century uncertainty. Yet as this essay has shown, even the judges who were adjudicating on questions of Māori custom and usage in the nineteenth century were very ambivalent about the possibility of a group of rules which governed their decisions. *Important Judgments* only supports the point. Smith had to find something on which their judgments rested: statute required that the Court determine the owners according to Māori custom and usage. The fact that custom and usage was so elusive that the judges themselves were unwilling to define their practice clearly is particularly significant given the discretion statute had always given the Court in such matters. Certainly, Smith's take are not the starting point many historians or indeed judges have assumed them to be when describing the process by which Māori customary land tenure was converted to individual title by the Native Land Court in the first 60 years of its operation.

Smith's approach to custom, however, continues to inform the way interests in land have been dealt with. There is a series of abstract rules of custom which can be identified in tikanga and applied to particular circumstances

to determine who has interests and who does not. It also provides the basis for what I would describe as fortress tribalism. This conceives of tribes as monolithic entities where all legal rights inside a defined tribal boundary can be legitimately allocated to that tribe. My work with Māori communities across the North Island over the past decade suggests that such an approach to boundaries and to the definition of tribes – given the layered nature of customary interests in land and the complexity of the whakapapa which defines those interests – is deeply flawed. It is important to flag here that I do not accept that a lack of rules or absence of a model of custom means chaos. Such an approach is an attempt to force Māori custom relating to land into a different, usually legal, context. My research indicates that land was managed through relationships between rangatira and between rangatira and their communities. The contrast is the Māori Appellate Court's decision which I have already referred to[15] and now I want to move on to the Crown's agreement in principle with Ngāti Whātua o Ōrākei.[16]

The key issue which I want to address is the question of the exclusive redress proposed in the AIP. In relation to custom, this probably has the most significant consequences primarily because exclusive redress prevents the Crown from providing the same redress to claimants groups other than the settling groups. The decision to provide exclusive redress had the effect of excluding others and so was a decision on custom. Two forms of exclusive redress were offered. One was exclusive commercial redress which included a right of first refusal area to purchase any surplus Crown properties within defined areas on the isthmus and the North Shore. The other was exclusive cultural redress which included vesting the freehold titles of the sites of Maungawhau (Mount Eden), Maungakiekie (One Tree Hill) and Puketapapa (Mount Roskill) in the governance entity subject to a number of reservations (to guarantee existing public access).

The Crown's initial response to concerns raised by the Marutuahu Confederation about the exclusive redress, both cultural and commercial, was that the redress was not based on assessments of customary interests. This remained the Crown's position at the hearing but it was not supported by the evidence presented. Many of the most significant documents did not become available until shortly before the hearing began and would never have been made public without the urgent inquiry. Professor Belgrave and I based our evidence on the only document available to us – the AIP – and correspondence between counsel for the Marutuahu Confederation and the Office of Treaty Settlements (OTS) manager in charge of the negotiations. It soon became

15 Above, n 3.

16 Signed by the Crown and Ngāti Whātua o Ōrākei representatives in 2006, modified in 2010 by a supplementary agreement taking into account some of the matters referred to below.

apparent from reviewing the documentation that decisions on custom were being made and that exclusive cultural and commercial redress was being offered to the settling group because officials had concluded they held 'predominant' interests over the sites affected. A definition of 'predominant' interests was not provided in the documents or at the hearing. Despite these documents, the Crown witness continued to insist that determinations of custom were not associated with the exclusive redress offered. This position was rejected by the tribunal.[17]

The decisions about custom which informed advice to ministers and appeared to provide the basis for the redress offered were prepared by an official from OTS who was a recent graduate with very limited experience in treaty issues let alone custom. No evidence that his work was supervised by a more experienced official was located. The tribunal expressed six concerns about the Crown's method for dealing with the customary interests of all kinship groups and tribes in Tāmaki Makaurau:

- the Crown did not acknowledge the customary implications of what it was doing, nor recognise its importance to others who were completely excluded;
- the Crown did not recognise the need to involve the other tangata whenua groups at all;
- the historical material relied on was not adequate for the task;
- the Crown's methodology for dealing with conflicting customary information was nowhere revealed in evidence or submission;
- the people within the Office of Treaty Settlements who were making decisions about customary interests were not sufficiently expert; and
- expert help was not sought. [18]

Some months after the AIP was signed, Grant Hawke, chair of the Ngāti Whātua o Ōrākei Māori Trust Board, wrote in the New Zealand Herald that the negotiations were able to proceed:

> … because the history and status of Ngāti Whātua o Ōrākei within the Auckland isthmus is already well established. In 1869, Judge Fenton in the Māori Land Court looked at the evidence before him at that time and recorded that Ngāti Whātua o Ōrākei was the dominant tribe of the central Auckland area. Later in 1987, the Waitangi Tribunal produced a report that came to the same conclusion.

17 Waitangi Tribunal *Tāmaki Makaurau Settlement Process Report* (Leglislation Direct, Wellington,. 2006) at 104-106.

18 Ibid, at 86-99.

> And, as part of getting to the Agreement in Principle, a third document has also been produced that backs that status - the Agreed Historical Account. The painstaking development of that agreed account between the Crown and Ngāti Whātua o Ōrākei details what has happened in dealings between the Crown and our hapu since 1840. [19]

It is important to point out that the second Ōrākei decision of the Native Land Court was about the ownership of the 700 acre block at Ōrākei and not the entire isthmus. The Waitangi Tribunal's Ōrākei report was about Ngāti Whātua's treaty claims over the same 700 acre block and not about their interests in the isthmus. The Crown insists that the agreed historical account is not an assessment of custom and yet, along with the Court's decision and the tribunal's report, is used by Mr Hawke to justify the trust board's claim that Ngāti Whātua o Ōrākei was the 'dominant tribe' in central Auckland. Decisions which exclude people always have ongoing implications for those excluded and are frequently used in different contexts for very different purposes. The tribunal addressed this issue in dealing with the question of predominance in relation to the three maunga in its findings:[20]

> We do not know whether the interests of Ngāti Whātua o Ōrākei in these three maunga are 'predominant' in relation to the interests of others and, as we have said, we think this is the wrong approach to adopt when there are multiple interests in maunga. We do not think that it has a basis in tikanga. It was plain on the evidence before us – and available also to the Office of Treaty Settlements – that, as regards the three maunga, there are multiple interests. The interests are multiple both in number and in kind. This is a consequence of the intensive occupation of Tāmaki Makaurau over the centuries, and activity in different places over that time. In situations like this, we believe that the grant of redress should take into account and reflect the multi-layered nature of these multiple interests. It is true that, because the Treaty of Waitangi was signed in 1840, breaches of the Treaty can only date from that time. Māori history did not begin then, though, and in dealing with cultural redress the Crown must confront the reality of layers of interests accreting over centuries.

The findings in relation to the maunga are very strong as the Tribunal believes the approach used by OTS to decide that such redress is appropriate was deeply flawed. In recognising the interests of only one group, the interests of others can be ignored or denied and so even proposing such redress in the absence of early discussions with other groups was a mistake. The tribunal does acknowledge that there are other interests and does not dismiss them out of hand. Indeed they find that 'there are no maunga about which it could confidently be said that only one group has interests' because interests in all

19 'Contributing to future main aim' (Guest Column, *NZ Herald*, Friday Dec 1, 2006).

20 Waitangi Tribunal, above, n. 16, at 105.

of them are layered. They specifically decline to make findings on what they call the 'relative strength' of these interests because "[q]uite simply, we do not know enough". They add, however, that "[n]either does the Office of Treaty Settlements".[21]

In fact, the tribunal's view is that the agreed historical account is based less on rigorous historical method and more on finding common ground between what the Crown was prepared to concede and what the settling group were willing to accept. The agreed historical account was also informed by the Crown's approach to custom. Its method for dealing with custom was to have unsupervised inexperienced junior staff making significant decisions about custom in secret. But what was most disturbing was the planned finality of the decisions taken once they were embodied in legislation. No provision was made for future negotiations. In our evidence, we referred to the last occasion where the Crown tried to do something similar: Governor Browne's decision to exclude Wiremu Kingi from the Waitara purchase.[22] This led to war in Taranaki in 1860 and, ever since, the Crown has delegated such matters to a court or commission to investigate. Whatever the limitations of the 19th century Native Land Court, at least it provided the opportunity for kinship groups or tribes to participate in a usually open process and hear the evidence given by competing kinship groups or tribes.

As I argued at the start of this paper, any resolution of competing claims based on custom is always arbitrary and whether it is acceptable to all groups and provides a durable outcome is always dependent on their capacity to participate in the decision-making process. Such an approach can be found in tikanga practised prior to colonisation. What I have also tried to show in this paper is that there are no external objective criteria against which claims to land based on custom can be assessed. Relationships between kinship groups and tribes are always subject to negotiation over time and as power relations between them change. It is up to them to find a solution with the assistance of the Crown (or a court) as any decision imposed from outside in the absence of any group will not prove durable.

The Crown has modified its negotiation process since 2007 and taken steps to adopt a more inclusive approach to shared customary interests in Tāmaki Makaurau. In February 2010, the Crown entered into a framework agreement with iwi comprising the Tāmaki Collective (Ngāi Tai ki Tāmaki, Ngāti Maru, Ngāti Pāoa, Ngāti Tamaoho, Ngāti Whanaunga, Ngāti Whātua ō Ōrākei Māori

21 Ibid at 106.

22 Danny Keenan 'Origins of War in North Taranaki' in Kevin Day (ed) *Contested Ground – Te Whenua I Tohea: The Taranaki Wars 1860-1881* (Huia, Wellington, 2010) p 19-33, at 21-22.

Trust Board, Te Ākitai, Te Kawerau Iwi Tribal Authority and Te Rūnanga o Ngāti Whātua). Ngāti Tamaterā also signed this agreement on 18 June 2010. The agreement set out the terms on which the Crown would negotiate deeds of settlement with each iwi for the settlement of their historical treaty claims. It is particularly concerned with the return of maunga and the management of rights of first refusal over Crown land in the Auckland region. This process is still in progress with some of the iwi completing deeds of settlement during 2011 and others working in negotiation to reach deeds of settlement by the end of 2012.

# Access to Customary Law: New Zealand Issues[1]

The Hon Deputy Chief Judge Caren Fox
Māori Land Court

## I. Introduction

In addressing the topic "Access to Customary Law: New Zealand Issues", I will discuss definitions of customary law and then I will move on and discuss different sources of Māori customary law. I will also discuss ways of working with Māori customary law by reference to the work of the Waitangi Tribunal and the Māori Land Court. The ultimate purpose of discussing these matters is to assist all concerned to identify and access Māori customary law.

## II. Definitions of Customary Law

I want to begin by discussing what is "customary law". To attempt a definitive definition of what is custom law is fraught with difficulty as scholars have diverse views and those views perhaps reveal more about their professional disciplines than they do about the nature of customary law. The difficulty of defining customary law is, perhaps, best reflected by pointing to the limited attempt made to deal with definitions in the Law Commission's "Māori Custom and Values in New Zealand Law Report" (March 2001).

I do not propose to attempt such a task either. Indeed, it would take a PhD thesis to do so. What I can do is share one of the sources that I have preferred from the literature that may assist others to begin their own journey of discovering customary law.

In some circles the study of customary law has been described as legal anthropology. An excellent description of this field of study is to be found in N Rouland's *Legal Anthropology*. He points out that legal anthropology is the study of law in society. It begins from the premise that all societies have

1 An earlier version of this paper was presented at the "Visible Justice: Evolving Access to Law" Colloquium (Wellington, 12 September 2002).

law.[2] He has identified that there are over 10,000 distinct known legal systems operating in the world today. A study of those systems indicates the following generalisations can be made:

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

In this approach, laws are nothing more than societal rules which have to be practically sanctioned in the here and now. Legal anthropology sets itself the objective of understanding these rules of human behaviour.[3] These rules must be designed to address wrongdoing and must, inter alia, be capable of being socially and practically enforced in the interests of the community. Only then will they be considered part of the legal domain of a society.[4]

However, it may be that this command theory of law is too rigid and too Western and that a preferable way of approaching custom law is that discussed by Dr Alex Frame in his book *Grey and Iwikau – A Journey into Custom*.[5]

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2 See generally N Rouland *Legal Anthropology* (The Athlone Press, London, 1994) and the discussion by R Boast "Māori Customary Law and Land Tenure" in R Boast, A Eurueti, D McPhail and N Smith *Māori Land Law* (Butterworths, Wellington, 1999) 1-42.

3 See generally N Rouland *Legal Anthropology* above n 2, and the discussion by R Boast "Māori Customary Law and Land Tenure" above n 2 at 2.

4 See generally N Rouland ibid., and the discussion by R Boast ibid n 2 at 47-108.

5 Victoria University Press, Wellington, 2002; see also Dr Frame's chapter in this volume.

Frame reviews the teachings of people such as Lon Fuller who described customary law as "a language of interaction". Taking that further, Frame argues that law "develops by incorporating, adapting and modifying diverse elements". If this approach is taken, then much of the flexible nature of custom is easily identified as law whether it stands alone or is grafted onto or accommodated within another legal system.[6]

## III. Pacific Societies

Perhaps, however, definitional approaches are unimportant in the context of trying to understand the nature of Māori customary law. It may be that it is more appropriate to study what happened here and what still happens here comparatively with other Pacific societies. Māori society, after all, is a Pacific society. From such study we may be able to learn new ways of revitalising Māori customary law.

Such a review could begin with looking back as suggested by Professor Richard Boast in his great chapter in *Māori Land Law*.[7] In his work he takes us back to theorists such as Malinowski and his *Crime and Custom in Savage Society*. In this work Malinowski studied the Pacific region and made attempts to identify that which in Pacific societies could be labelled customary law.[8] For example, he has generalised that obedience to laws in these societies was achieved through the concept of reciprocity. The law was usually obeyed because individuals knew that on other occasions they would benefit from the obedience of others. A review of the writings of Sir Edward Durie on the subject[9] suggests that this argument is valid in relation to Māori law.

Aside from a review of these historical works and anthropological studies, there is much to be learnt from the study of customary law as it is being applied today in Pacific countries. Custom law is affirmed and recognised in many Pacific constitutions and there are an ever increasing number of customary law sources such as records of judgments or observations on the application of custom in villages emerging out of these jurisdictions. Likewise a number of legal scholars from the University of the South Pacific Law School have published extremely thoughtful papers on the application of customary law in

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6 See generally K Sinclair *A History of New Zealand* (Penguin Books, 1991) Prologue and E Durie "Custom Law: Address to the New Zealand Society for Legal and Social Philosophy" (1994) 24 VUWLR 325 at 328 and 329.

7 Above, n 2.

8 See B. Malinowski *Crime and Custom in Savage Society* (Routledge and Kegan Paul, London, 1926) and N Rouland *Legal Anthropology*, above n 2, for a discussion on law in ancient societies.

9 E Durie "Custom Law" (Unpublished Paper, January, 1994).

these societies. Many of these resources can be sourced from the University of the South Pacific Law School website. Follow the links to the School of Law – Vanuatu. A range of legal materials can be accessed from this site without leaving your office or library.[10]

## IV. Māori Customary Law

As is clear from the research completed so far in this area, our general understanding of Māori law is evolving. What is emerging from the research can only be described as broad in scope and laced with generalisations which still need to be properly tested tribe by tribe or region by region.[11] Failure to do so will always mean, no matter how good any glossary or dictionary of terms may be, that concepts of Māori law will be selectively chosen to fit outside the cultural context within which they have evolved and adapted. In my view, Māori customary law concepts can only be properly ascertained and applied by considering their historical evolution within a particular hapū or iwi from ancient times through to the present. The challenge is to uncover and demonstrate that evolution.

What we do know from the research completed to date is that some emphasis has been given to conceptually framing Māori law in terms of "tikanga Māori". This term is being used to describe the norms that maintained law and order in Māori society.[12]Tikanga, according to Sir Edward Durie, describes Māori law and the word is derived from the word "tika" or that which is right or just. Translated into English, tikanga has been rendered to mean "rule".[13] It is the sum total of such norms and values that formed tikanga Māori or Māori law. Māori operated by reference to tikanga and that was underpinned by philosophical and religious principles, goals and values. All combined to regulate the conduct of individuals, whānau, hapū and iwi and in this way social control was maintained by doctrines, such as the doctrine of tapu. It is this law that determined and still determines Māori proprietary customary law.[14]

10 See, for example, Kenneth Brown "Customary Law in the Pacific: An Endangered Species?" 3 Journal of South Pacific Law, Article 2.

11 E Durie "Custom Law", above n 6 at 325.

12 Ibid., at 2-4.

13 HW Williams *Dictionary of the Māori Language* (Government Print, Wellington, 1997).

14 H Kawharu *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) at 40 and see E Durie "Custom Law" above n 6.

According to this approach, prior to 1840 and in many parts of the country until the mid 1860s, Māori hapū (subtribes) and iwi (tribes) were exercising "tino rangatiratanga" or sovereignty over their territories, resources and affairs.[15] They did so in accordance with tikanga Māori or Māori law which operated as an effective legal order.[16] This Māori system of law and custom was used to make decisions regarding, inter alia:

- leadership and governance concerning all matters including Māori land;
- intra-relationships and interrelationships with whānau (extended families) hapū (subtribes), iwi (tribes/nations);[17]
- relationships with Europeans;[18]
- determining rights to land based on take tupuna (discovery), take tukua (gift), take raupatu (confiscation) and ahikaa (occupation);[19]
- the exercise of kaitiakitanga (stewardship) practices including the imposition of rāhui (bans on the taking of resources or the entering into zones within a territory) and other similar customs;[20]
- regulating use rights for hunting, fishing and gathering and sanctioning those who transgressed Māori tikanga or Māori rights (or both) in land and other resources;[21]
- regulating Māori citizenship rights to land and resources.[22]

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15 See W Swainson *New Zealand and its Colonisation* (C Smith, Elder & Co, London, 1859) at 151, L Cox *Kotahitanga: the Search for Māori Political Unity* (Oxford University Press, Auckland, 1993) at 3-4 and chs 4 and 7.

16 FM Brookfield *Waitangi & Indigenous Rights, Revolution, Law & Legitimation* (Auckland University Press, Auckland, 1999) at 86 and 87, and note the recognition of this law in the New Zealand Constitution Act 1852 (UK) 15 & 16 Vict, s 71.

17 A Erueti "Māori Customary Law and Land Tenure" in R Boast, A Erueti, D McPhail and N Smith *Māori Land Law* (Butterworths, Wellington, 1999) at 33-37 and 38-41.

18 A Ward *A Show of Justice*: *racial 'amalgamation' in nineteenth- century. New Zealand* (Auckland, Auckland University Press/Oxford University Press, 1974), at 23, and see A Erueti "Māori Customary Law and Land Tenure" above n 17 at 28-30.

19 A Erueti, ibid., at 42-45, G Asher and D Naulls *Māori Land* (NZ Planning Council, Wellington, 1987) at 5 and 6; and see H Kawharu, above n 14 at 55-56.

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

21 Ibid., at 58, 61.

22 H Kawharu, above n 14 at 39, A Erueti "Māori Customary Law and Land Tenure" above n 17 at 33-35, G Asher and D Naulls *Māori Land*, above n 19, at 7. See also E Durie "Custom Law" above n 6 at 5. Note that these scholars use the term "membership" where this author uses "citizenship".

## V. Sources of Māori Customary Law

Māori customary law was affirmed in the Treaty of Waitangi through the guarantee of "tino rangatiratanga" and is recognised in the common law of New Zealand through the doctrine of aboriginal rights, although the extent to which tikanga Māori can be recognised remains to be argued. There are now a number of statutes that recognise tikanga Māori including Te Ture Whenua Māori Act 1993, Resource Management Act 1991, the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, to name just three. Then there is the array of statutes that refer to the Treaty of Waitangi. These statutes by implication include tikanga Māori.

For these reasons it is important for all those who work in the law, either as law librarians, judges, lawyers, lecturers, researchers or law students, to be able to identify appropriate sources of Māori law.

I suggest all who assume these roles also start to learn Māori, as we on the Māori Land Court bench are doing. The purpose would be to become properly conversant with those in Māori society who are knowledgeable of Māori tikanga and te reo Māori. Only then can the written sources, that they are all so good at identifying, be placed in context.

I will now attempt to list some of the sources of Māori customary law to demonstrate the breadth of material that is available on the subject.

Alex Frame with Paul Meredith in 2004 noted that English law is primarily written, whereas those of "Maori law are performances from a customary repertoire of songs, chants, dances, ceremonial acts of various types, carvings, and so on."[23] Their preferred approach was to recognise the work of Professor Bernard Hibbitts at the University of Pittsburgh School of Law who has noted that customary law is personal, social, dynamic, ephemeral.[24]

Thus it is the oral history of Māori people that is the primary source of Māori law and it is to be found: in te reo Māori (Māori language); in Māori cosmology; in whakapapa or genealogy; in waiata (song); in tribal and hapū citizenship and social organisation; in whakatauākī and whakataukī (proverbs and sayings); karakia (prayer); in the arts including the performing and ancient and contemporary visual arts; in place names (rivers, mountains, gardens, wāhi tapu etc.) and peoples names; in whaikōrero (male oratory) and karanga (female oratory); in meeting houses including the carvings and tukutuku

23 A Frame and P Meredith "Performance and Maori customary Legal Process" (paper prepared for Symposium on Concepts and Institutions of Polynesian Customary Law, University of Auckland, 2004) at 1.

24 Ibid., at 2.

(woven) panels; in the cultural use of resources and the artefacts and utensils that were adapted to gather those resources. It is there to be researched for the benefit of future generations.

It seems to me that the next step in beginning this journey of discovery for those who are just coming to terms with Māori customary law should be with Sir Edward Durie's "Custom Law Paper"[25] and Hone Clarke's "He Hinatorekite Ao Māori – A Glimpse into the Māori World: Māori Perspectives on Justice"[26] available on the Ministry of Justice website.[27] Watch out for the publication of *Te Mātāpunenga, the Compendium of References to the Terms and Concepts of Māori Customary Law* (see articles by David Baragwanath, Alex Frame and Richard Benton in this volume). Waikato University's Library has a large collection available on Māori customary law and the bibliographies can be easily obtained from the web.

Then read the Law Commission's *Māori Custom and Values in New Zealand Law* report (March 2001). The next step is to also read the Law Commission's *Justice: The Experience of Maori Women Te Tikanga o te Ture: Te Matauranga o Nga Wahine Maori e Pa ana ki Tenei* (1999), because both reports touch on the devastating impact caused by the imposed legal system during the period of colonial denial of Māori law from 1860 to 1975.[28] These studies will give you an overview of what the field covers.

An archival source review should naturally follow if more depth is required, including consulting early settler and Māori written observations such as those recorded in the diaries of William Colenso and George Grey etc. Early Māori writings include whakapapa books and diaries such as those held by the Auckland Museum, many of which are in Māori and are access restricted. Other Māori sources include the letters and articles written for the old Māori newspapers. Anthropological works such as those produced by Elsdon Best and Sir Peter Buck (Te Rangihiroa) have their place in this jigsaw as do publications such as the *Journal of Polynesian Society*. Books such as *Ngā Mōteatea* as recorded by Pei Te Hurinui Jones and Sir Apirana Ngata (recently republished four volumes by the Polynesian Society and Auckland University Press) and the tribal histories such as Don Stafford's *Te Arawa* (now out of print) are important sources of this knowledge. Librarians are especially well placed to assist in identifying these works.

25 Above n 6.
26 Ministry of Justice, Wellington, 2001.
27 Available at <www.justice.govt.nz/pubs/list/process_order.asp?pub=r691>
28 Available at <www.lawcom.govt.nz>.

Other sources include the many letters, submissions and articles or study papers written by Māori to Parliamentary Select Committees, Ministers and Government Departments, all sources waiting to be properly identified and referenced into a tikanga Māori series. Many are published in the Appendices to Journals of the House of Representatives.

In contemporary times notable authors such as Sir Hirini Mead, Tania Rangieuea, Dr Pat Hohepa, Sir Hugh Kawharu, Māori Marsden, Pene Taiapa, Dr Apirana Mahuika, Ani Mikaere, Moana Jackson, Sir Mason Durie, Andrew Erueti, Judge Stephanie Milroy, Whaimutu Dewes, Dr Nin Tomas, Dr Rose Pere, Dr Margaret Mutu and many more have written on topics that bear on this subject. Their various publications should be listed by academic and legal librarians along with any other source material they may have into an index for custom law researchers who will use their libraries.

Sources such as the record of proceedings for Courts or tribunals including the Minute Books of the Māori Land Court and the archives and reports of the Waitangi Tribunal have a wealth of information as well.

## VI. Work and Resources – Waitangi Tribunal, Māori Land Court and mainstream

I now want to turn to consider how tikanga Māori is being used in the work of the Waitangi Tribunal and the Māori Land Court and then in the mainstream legal system.

I am one of the 11 judges of the Māori Land Court. We sit in seven districts and we administer approximately 5.6 per cent of the New Zealand land base that is still classified as Māori land. We are also available to sit as Presiding Officers on the Waitangi Tribunal. As the two legal institutions within the dominant legal system most closely aligned to the revitalisation of tikanga Māori, I think it is important to discuss how we apply tikanga Māori in our work.

### A. *Waitangi Tribunal*

The Waitangi Tribunal was first constituted in 1975 under the Treaty of Waitangi Act of that year. It was established to hear claims from Māori filed against the Crown pursuant to section 6 for inter alia any acts or omissions that were inconsistent with the "principles of the Treaty of Waitangi". Initially the

Waitangi Tribunal struggled to find a way to incorporate tikanga Māori into its work and reports.[29] However, with the appointment of Sir Edward T Durie as the Chairman of the Tribunal by 1982, that position changed dramatically.

In my view, the Waitangi Tribunal model is important in the revitalisation of tikanga Māori because of the way it is constituted to hear claims. It brings together a mix of historical, legal and tikanga Māori experts who analyse early settler and official accounts with oral history. The Tribunal hears claims in panels of three to five and many of these panels have been keen to experiment with procedure, or introduce innovations so as to accommodate the particular circumstances of the claims or context of claimant groups, while ensuring a fair process for the Crown.

Schedule 2 of the Treaty of Waitangi Act 1975 at clause 8(1) deems the Tribunal to be a commission of inquiry, under the Commissions of Inquiry Act 1908 (COI), and, subject to the provisions of the 1975 Act, all the provisions of that COI, except sections 11 and 12 (which relate to costs) apply accordingly. As with all commissions of inquiry, the Waitangi Tribunal has wide powers to regulate its own procedures. Under clause 5, sittings of the Tribunal are held at such times and places as the Tribunal or the presiding officer may from time to time determine. The Tribunal may meet in private or in public, as the Tribunal from time to time decides. Unless expressly provided in the 1975 Act, the Tribunal may regulate its procedure in such manner as it thinks fit, and in doing so may have regard to and adopt such aspects of te kawa o te marae (customs of the marae) as the Tribunal thinks appropriate in the particular case, but shall not deny any person the right to speak during the proceedings of the Tribunal on the ground of that person's sex. Thus a Tribunal hearing may start on a marae ātea (the domain in front a meeting house associated with Tūmatauenga – the God of War) with the full ritual of encounter, known as the pōwhiri (welcome ceremony). During that time speeches and waiata/haka delivered or performed are noted to ascertain the key factors of any claim, namely, who the local people are, what their whakapapa is and how that whakapapa links them to the land and other natural resources of the area or any other aspect of the claim.

Clause 6 provides that the Tribunal may act on any testimony, sworn or unsworn, and may receive as evidence any statement, document, information, or matter which in the opinion of the Tribunal may assist it to deal effectually with the matters before it, whether the same would be legally admissible evidence or not. In addition, witnesses appearing before the Tribunal may give their evidence in the Māori language. These pillars of procedure have

29 See A Ward *An Unsettled History: Treaty Claims in New Zealand Today* (Bridget Williams Books, Wellington 1999).

ensured that kaumātua (elders) and other traditional experts who wish to give evidence can do so without the strict formality associated with more formal court or tribunal processes and they may do so in the Māori language.

Also notable is clause 7, which makes it clear that any claimant or other person entitled to appear before the Tribunal may appear either personally or, with the leave of the Tribunal, by a barrister or solicitor of the High Court; or any other agent or representative authorised in writing. Any such leave may be given on such terms as the Tribunal thinks fit, and may at any time be withdrawn. I have emphasised this "leave" aspect as it is too easily forgotten in this jurisdiction, that representation by a barrister or solicitor is not a right and that the Tribunal has the right to reduce the number of lawyers who appear and thereby reduce the amount of formality so as to create a more direct relationship with claimants.

As a result of the approach it takes to the hearing of claims, the reports of the Tribunal now demonstrate its unsurpassed expertise in dealing with evidence of tikanga Māori. When I first wrote this paper in 2002, the Waitangi Tribunal had incorporated several brilliant chapters in *Te Whanganui-a-Orotu Report* (Wai 55, 1996), *Whanganui River Report* (Wai 167, 1999), *Rekohu – Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wai 64, 2001) integrating, with some sophistication, tikanga Māori. Since 2001, there have been even more detailed chapters and sections of Waitangi Tribunal reports emphasising customary evidence and tikanga Māori. These reports include the *Turanga Tangata Turanga Whenua Report* (Wai 814, 2004), *He Maunga Rongo – the Report on the Central North Island Claims – Stage 1* (Wai 1200, 2008), *Mohaka ki Ahuriri Report* (Wai 201, 2004), *The Urewera Report* (Wai 894, 2009), *Wairarapa ki Tararua Report* (Wai 863, 2010), *Te Tau Ihu o te Waka a Maui – Preliminary Customary Rights Reports 1 & 2* (Wai 785, 2007), and the recently released *Ko Aotearoa Tenei – A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* (Wai 262, 2011). All the reports of the Waitangi Tribunal may be found on line at the Waitangi Tribunal's website.

Aside from the reports of the Tribunal, there are countless tapes, mana whenua reports and written briefs from Māori witnesses who have given traditional and contemporary evidence of Māori law, custom, practices and beliefs during the hearing of their claims. These sources are held in the archives of the Tribunal and remain to be discovered by the student or researcher of customary law.

## B. *Māori Land Court*

In relation to the Māori Land Court, we too have some experience with Māori customary law and dealing with Māori communities. At various times in the history of the Court since 1865, our Court has been charged with the responsibility of applying Māori tikanga in relation to ascertaining rights and interests in land, including hearing evidence on Māori customary adoptions, Māori customary title, Māori succession practices, customary marriages, Māori genealogy, wāhi tapu or sacred sites, fishing grounds and other places of importance.

The Preamble to Te Ture Whenua Māori Act 1993, sections 2 and 17, implicitly require the Court to consider applications before it in a manner that takes into account aspects of tikanga. Tikanga is defined in our statute at section 3 as "Māori customary values and practices". In addition, the flexible nature of our procedure, with an emphasis on avoiding any unnecessary formality as set out in section 66, allows us to adopt marae kawa or protocols and to hear cases in the Māori language. Since 2009, I have used this provision to sit with elders during standard Court sittings in Te Kaha, Opotiki, Wairoa, Gisborne and Ruatoria. Of course, they cannot sit to hear the case under this provision as they are not legally part of the Court, but they can and do assist with tikanga Māori issues that may emerge at the commencement, during or at the conclusion of a case.

For specific cases, the parties, the Governor-General in Council, the Minister of Māori Affairs, the CEO of Te Puni Kōkiri or the Chief Judge, or any other court, commission or tribunal may also refer issues, or receive advice from the Māori Land Court on matters that raise tikanga Māori concerns. These include matters heard under Te Ture Whenua Maori Act 1993, sections 26A–26N, 26O–26ZB, 27, 29, and 30–30J. These provisions deal respectively with Māori fisheries disputes, Māori aquaculture disputes, special jurisdiction cases under section 27 and 29, and representation disputes. Tikanga Māori experts can be appointed to hear such cases, and these experts form part of the Court with full decision making power.

More often, however, the judges sit alone in areas such as the Taitokerau, Waikato, Rotorua, Taupo and Aotea where there are still people whose first language is Māori. Coupled with the ageing of kōhanga reo graduates, the first generation of whom are now old enough to appear in the Court, there is a demand for Māori language speaking judges.

Nonetheless, despite the experience and familiarity of the Court with matters of custom, it would be a mistake to conclude that the judges are experts in tikanga Māori. The reality is that the complex nature of the statutory framework

surrounding Māori land law means that lawyers, who do not necessarily have expertise in tikanga Māori, have in the past dominated our bench. That is why kaumātua have to be appointed to boost the Court's ability to hear such cases. This lack of expertise is also the reason why we are exploring the possibility of extending the composition of the Court to include kaumātua or "pūkenga" sitting with judges to hear applications before the Court as full members of the bench.

In addition, the Māori Land Court judges are all attending annual Māori language and tikanga Māori wānanga (learning hui) sponsored by the Institute of Judicial Studies. This initiative was first instituted in 2001 and has continued every year since then. This is an initiative that comes after 137 years of legal history.

Although several of the Native Land Court judges in the 1800s spoke some Māori, there was no legal requirement to have any knowledge of Māori tikanga or language to be appointed a judge of this Court. The good news is that this issue has been addressed in Te Ture Whenua Māori Amendment Act 2002. Now section 7 requires that only people who are suitable, having regard to their knowledge and experience in te reo Māori, tikanga Māori, and the Treaty of Waitangi, should be appointed as judges of the Māori Land Court and it is a matter taken seriously during the interview process for new judges.

Appeals from the Māori Land Court are made to the Māori Appellate Court where major concerns raising tikanga issues can be fully heard and determined by three judges of the Māori Land Court. In addition, the High Court can state a case to that Court on any question of tikanga under section 61 of Te Ture Whenua Māori Act 1993 and under section 99 of the Marine and Coastal Area (Takutai Moana) Act 2011.

Turning to the resources of the Māori Land Court, it is important for researchers of customary law to understand the nature of Māori customary land tenure and the manner in which the Native Land Court was used as an instrument to assimilate that title into the new colonial legal order. This process should begin by reading the excellent chapter referencing most of the known works in this field by Professor Richard Boast in *Māori Land Law*.[30] The next publication to read is *Customary Māori Land and Sea Tenure: Ngā Tikanga Taonga o Neherā*.[31] Then become familiar with the resources of the Māori Land Court, which still acts as the repository for the largest collection of indigenous knowledge on this subject.

30 Above n 2.

31 Manatū Māori, Wellington 1991.

The evidence and early judgments of the Native Land Court are another useful source of customary law and these are to be found in the Minute Books held in each of the seven Māori Land Court Registries and in the Chief Judge's Minute Books.

In modern times, tikanga Māori concerns raise various issues before the Court and some of the more recent relevant Māori Appellate Court judgments dealing respectively with the rights of whāngai (customary adoptions), rights of children, selling of interests in land and rights on intestacy include *Hohua – Estate of Tangi Biddle or Huhua* (2001),[32] *Niao v Niao* (2004),[33] *Mihinui – Maketu A100* (2007),[34] and *Nicholas v Kameta – Estate of Whakaahua Walker Kameta – Te Puke 2A2A3B1 and 2A2A3B2* (2011).

Accessing the records of the Māori Land Court, including its judgments, is becoming easier. That has not always been the case. Less than five years ago the Māori Land Court records (comprising 12 million pages of paper records) could only be accessed by travelling to each Māori Land Court registry. Through the introduction of a new computer system, all that has changed. The Māori Land Information System or MLIS contains a complete computerised index of all Māori land title and ownership information. MLIS is now available online so that Māori living in urban settings can search their land information by using names of individuals or block titles.

All of this information can be accessed at every Māori Land Court district registry and anywhere else where a Court officer or judge has a laptop computer and can connect to the network. In addition, the system has been extended to an imaging project allowing the historical records of the Court to be computerised. The Māori Land Court also has its own web page with all the judgments of the Māori Appellate Court and reasonably important judgments of the Māori Land Court loaded on site. Other information concerning the Court and its services and Māori land are accessible via this web page. Finally, the Pānui of applications for hearing before the Māori Land Court is published monthly and is delivered to any person who requests a copy.

32 10 Waiariki Appellate Minute Book 43.
33 10 Waiariki Appellate Minute Book 263.
34 11 Waiariki Appellate Minute Book 230.

## C. *Mainstream legal system*

I conclude by noting that other than a few successes in the Privy Council during the early 1900s in cases such as *Nireaha Tamaki v Baker* (1900–1901)[35], *Baldick v Jackson* (1910),[36] *Hineiti Rirerire Arani v Public Trustee* (1919)[37] and in more recent cases in the local courts such as *Te Weehi v Regional Fisheries Officer* (1986)[38] and *Ngati Apa v Attorney-General* (2003)[39] where Māori custom has been recognised or acknowledged as a potential source of rights, the mainstream courts have been challenged by the notion that it is a form of law. However, a discernible shift is occurring. This is reflected in judgments from all the courts and initiatives such as the Rangatahi Courts and the use of kaumātua (elders), the Environment Court's willingness to have alternate Environment Court Judges from the Māori Land Court and that Court's acceptance of Māori protocol such as karakia (prayers) and mihi (greetings) and the District Court's recognition of the appropriateness of custom in certain contexts.

Where there remains some entrenchment relates to the role of Parliament. Although sometimes flirting with notions of custom such as in Te Ture Whenua Maori Act 1993, the Resource Management Act 1991 and the other statutes referred to above, it has struggled with the notion of customary law and has consistently legislated to nullify the impact of any court decisions that it believes threatens its sovereignty as the penultimate source of all law concerning Māori.

Thus, it seems to me, there needs to be a continuing constitutional conversation about the place of Māori customary law, the Treaty of Waitangi, the Constitution and the future we see for the tangata whenua of the nation state that is New Zealand-Aotearoa.

35 [1842-1932] NZPCC 371.
36 30 NZLR 343.
37 NZPCC 1.
38 [1986] 1 NZLR 680.
39 [2003] 3 NZLR 643.

Overview

# The Status of Customary Law: Achievements and Prospects

Dr Guy Powles

The study of custom and customary law, and their place in the national polity, is coming to the fore, as their relevance is increasingly recognised. For people living according to custom or engaged in aspects of it, further knowledge is desired of its history and meaning. Leaders entrusted with policy-making at different levels require, in addition, a sound understanding of the nature of custom and customary law, and the dynamics of its interaction with other social norms and particularly the law and legal apparatus of the State.

This is a large and complex area of study which deserves the commitment of resources by governments, universities and cultural centres, and the development of materials for secondary-level education.

In a brief contribution to mark the first Symposium in 2004,[1] I referred to my conviction that the relationship between strongly held cultural beliefs and law, as articulated through established language, had been inadequately researched and understood, requiring genuinely interdisciplinary and comparative approaches on a Pacific-wide basis, as well as in-depth local studies.[2] Up to that point, I had been a student of Samoan customary law since the mid-1960s, held judicial positions in Samoa and Micronesia, focused on the constitutional systems of newly independent states, and had examined the plural law systems of most other Pacific Island countries, culminating in research for the teaching of Pacific Comparative Law at Monash University and Customary Law at the University of the South Pacific School of Law in Vanuatu.

As I became more familiar with the work of Te Mātāhauariki Institute and its associated projects, *Te Mātāpunenga* in particular, I was deeply impressed by the collected achievements of the dedicated individuals involved, many of whom are contributors to this volume.

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1 Reproduced in part in a preface to Richard Benton (ed) *Conversing with the Ancestors* (Te Mātāhauariki Institute, Hamilton, 2006) at v.

2 Guy Powles "Customary Law Systems and the Pacific Island State: the Search for Workable Relationships" (2003) 2(1) The New Pacific Review 263, Australian National University.

In this book's concluding "overview" of the 2007 Symposium, it is impossible for me to do justice to each of the chapters, representing as they do, an extraordinary diversity of approaches and subject matter. The field of study 'Custom and the State' lends itself to the identification of certain dimensions. This treatment does not purport to be in any way comprehensive, but is designed to reflect the contributions to the subject contained in this book.

Accordingly, the Polynesian experience of the Samoans and Hawaiians is considered alongside that of the Māori, and some broader Pacific-wide discussion has ensued.

The dimensions of the subject are reviewed under four headings:

I. The language of custom
II. The nature of customary law
III. The relationship of customary law to the legal system as a whole
IV. Conflicts of norms, erosion of custom and the future.

## I. The Language of Custom

The place of custom in the social fabric of a nation is evidenced by the extent to which language is central to the custom system. The statement of Sir James Henare that "The language is the core of our Māori culture and mana"[3] set the scene for this volume's exploration of the importance of language.

The first port of call is undoubtedly Richard Benton's account of and introduction to the Te Mātāpunenga Compendium,[4] "a collection of annotated references to the concepts and institutions of Māori customary law", which is to be published in final form in 2012. The Compendium's etymology of 114 key terms links Māori with its past and with other languages of Proto-Polynesian origin over a period of 2500 years. In this volume, Benton's chapter offers insights into the value of this research, together with discussion, and intriguing examples of how old and new meanings have been blended. Such research techniques might one day help to answer questions about such matters as the status of women under pre-custom, referred to by Claire Slatter.[5]

Historical depth, and acknowledgement of change in meaning, direct attention to issues surrounding the use and interpretation of language. In addressing questions about the conservative nature of custom, Helen Aikman has pointed to the Law Commission's recommendation against the codification of custom

3 Baragwanath J, Preface, this volume.
4 Benton, this volume.
5 Slatter, this volume.

language.[6] Through its explanation of the roots and values of a custom, the *Te Mātāpunenga* commentary shows how it has been adapted over time.[7] So, insofar as the authenticity of a custom is dependent on the language in which it is expressed, allegations that a particular custom has been invented may be tested by adjudicators and scholars who may "identify and denounce fabrications and false pleadings…".[8] This is highly topical in New Zealand, involving the concept of tapu in its application to wāhi, where wāhi tapu means protected place. Robert Joseph has reviewed recent litigation to reveal problems of proof and adjudication around language.[9]

Turning now to Samoa and its chiefly system of faamatai, the three elements considered to be a Samoan's core identity and inheritance are the matai title, the land appurtenant to the title, and the Samoan language. Tamasailau Suaalii-Sauni has offered probing insights into the word choices people make in asserting customary knowledge, and has challenged us to think more deeply about the "discourses of certainty" that such choices may invoke.[10]

The discussion is illustrated by reference to several contexts, such as the Samoan words used for "Samoan custom and tradition" in the Preamble to the nation's Constitution on independence in 1962, the variety of interpretations that villagers placed upon the meaning of the Village Fono Act 1990, and submissions to the Land and Titles Court in disputes over the rightful heir, suli, and assertions of authority, pule. In the course of her wide-ranging discussion, Suaalii-Sauni has presented evidence of scholarly activity around the Samoan language which fits well with the objectives espoused by *Te Mātāpunenga*.

## II. The Nature of Customary Law

Language frames and gives meaning to law. Terms mark or label understood sets of laws, defining subject areas (for example, suli and pule referred to above). Justice Heath has observed that "there is as much a Māori law as there is a Māori language".[11] The discussion begins here with the ways in which words are used and interpreted so as to declare our values and define our customs and practices, that is to say, our social norms. It then enlists words which require or prohibit certain activity or behaviour in order to formulate a statement of customary law. It is the hallmark of customary law that it does not rely on the State for its effectiveness. The Editorial Board of *Te Mātāpunenga*

6 Aikman, this volume.
7 Benton, this volume.
8 Frame, this volume.
9 Joseph, this volume.
10 Suaalii-Sauni, this volume.
11 Heath J, this volume.

approved a definition of customary law which makes it clear that a social norm may be recognised as law even if its breach may not be met with force, but instead by "the construction of serious social disadvantage by an individual, group, or agency possessing the socially recognised privilege of so acting". Alex Frame has provided a useful account of how the definition was arrived at.[12] In many Pacific Island communities, public shaming, ostracism from local affairs and economic penalties are sufficient sanctions to sustain a system of social control.

In societies where custom is maintained around the authority of chiefs, it is sometimes difficult to identify the rationale behind obedience to chiefs' instructions. In fact, reciprocity of obligation sustains a close relationship where leaders of kinship groups earn obedience. Chiefs of higher rank and councils of chiefs depend for their effectiveness on the making and enforcement of rules that have community support. When State laws intervene to recognise, adopt and support a chief's function, the chief may come to depend on his statutory "clothing" rather than reciprocal obligation and customary respect. Indeed, the nature and utility of chiefly authority generally is a topic deserving research and debate in many Pacific Island societies.[13]

Of course, an assumed characteristic of customary law is that it is often, and in the distant past was always, unwritten. For all but those people today who are actually living under customary law, by the time it comes to be disputed, it is almost always written down in one form or another. Customary law may appear in codifications, in sets of village rules (as in Samoa and Vanuatu) or in constitutions and statutes that give effect to customary law principles (as does the Village Fono Act, Samoa). In the Land and Titles Court of Samoa, customary law is presented to the Court in written pleadings. These, with the statements of contending parties, and the Court's findings of fact, are written into the record. Very often, however, the Samoan Court does not announce or record its reasons in customary law terms.

Discussing the charge that custom may be 'made up' to suit, Frame has drawn attention to the risk that claimants may invent law, and that judges may invent law – to suit the facts – to be recorded for posterity. He urges that customary law should instead be "found" by the judges, from the "bottom up" development of laws.[14] Grant Young has presented a critical analysis of attempts over time to arrive at a set of criteria against which claims to Māori

12 Frame, this volume.

13 National University of Samoa is a logical venue. See Guy Powles "Chiefly Systems and Pacific Island Constitutions: Comparative Trends Relevant for Samoan Studies" (2005) 1 The Journal of Samoan Studies 119.

14 Frame, this volume.

land based on custom could be assessed. At different stages in the history of claims, custom was researched, rules were stated and restated, and judgments of the Land Court accumulated. A codification in 1942 "imposed twentieth century order retrospectively on nineteenth century uncertainty".[15] Young has concluded that what is today claimed to be Māori customary law in relation to land claims has in fact failed to capture its complexity and the layers of interests accreted over time.

In the context of New Zealand's contribution to the study of customary law, one of the objectives of this volume is to recognise the brief but hugely significant life of the Te Mātāhauariki Research Institute. It is modestly outlined in "A Short History",[16] but may perhaps be better understood in light of the extensive list of newsletters, books and chapters, articles, occasional papers, addresses and other presentations published under the aegis, or by members, of the Institute. Readers are recommended to peruse this list, which is presented here as the Appendix to the "Short History".[17]

In a detailed examination of the growing significance of wāhi tapu, Joseph has demonstrated how the *Te Mātāpunenga* methodology has produced an essential resource for the judiciary and wider public, particularly where challenges occur at the interface between tikanga Māori custom and State regulatory systems.[18] Wayne Rumbles has drawn attention to the importance of looking closely at some of the ways that *Te Mātāpunenga* information can be and has been disseminated, and the issues involved.[19]

## III. Relationship of Customary Law to the Legal System as a Whole

The size of this dimension of the subject invites some subdivision. Drawing on the foregoing chapters, this section will review the relationship of customary law to the legal system as a whole under four headings:

A. History of the relationship
B. Sources of law, judicial systems and spheres of operation today
C. Recognition of customary law and its ranking in the courts of the State
D. Problems of proof

15 Young, this volume.
16 Frame, Rumbles and Benton, this volume.
17 Ibid.
18 Joseph, this volume.
19 Rumbles, this volume.

## A. *History of the relationship*

The only phrase that accurately describes the first meeting and interaction of the customary laws of the societies of the Pacific Islands and New Zealand with introduced laws and institutions is diversity of experience.

Indeed, this is a good point in the chapter to review the layers of difference that characterise the Pacific Island and New Zealand experience. They are a key element in the understanding of societies, which is still not fully appreciated by many commentators and policy-makers. The original inhabitants of the islands of the region had developed distinctive orders of traditional governance and social control. Slatter has reviewed traditional gender divisions across Polynesia, Melanesia and Micronesia.[20] Such orders in turn responded in different ways to introduced concepts and processes, themselves flowing from a broad spectrum of European and American religious beliefs, legal traditions and commercial practices. Another layer of difference which distinguished Pacific region experiences, one from the other, was the character of foreign administrations during colonial periods, and the steps taken to deal with a plurality of sub-systems of law. As time went on, whether a territory had international status as a 'mandate' then 'trusteeship' (the case of Samoa, New Guinea and Nauru) or a lesser or contested degree of autonomy (for example, New Caledonia) became significant. In summary for the region, one of two main routes has been adopted by indigenous societies – either incorporation into a state alongside introduced societies, or a degree of autonomy ranging from independence to 'free association', under a constitution reflecting certain international standards, but accommodating to greatly varying degrees across the region, elements of indigenous values and customary law.

Accordingly, there is a very different story to tell for each society and polity. Readers are indebted to contributors to this volume, particularly Benton for insights from the language perspective,[21] Young for his historical approach incorporating the reminder that Māori history did not begin with the Treaty of Waitangi,[22] and, to the north, Melody MacKenzie for her study of white interference as played out through the division of Hawaiian land in the Mahele and the limitation of Hawaiian land-holders' rights flowing from the Kuleana Act.[23]

20 Slatter, this volume.
21 Benton, this volume.
22 Young, this volume.
23 MacKenzie, this volume.

Of particular relevance to setting the scene for the development of Māori-Pākehā relations in New Zealand is John Farrar's examination of the motivations and recorded statements of key players involved in the formation and early administration of New Zealand as a Crown colony. These divergent, often opposing, views, as expressed, reveal how ill-prepared and inconsistent policies must have contributed to growing Māori apprehensions about the future of their land and culture. As Farrar concludes, rather mildly, the development of the New Zealand State was "complex and sometimes troubled".[24]

## B. *Sources of law, judicial systems and spheres of operation today*

The overall significance of the role and scope of customary law in a country today may be said to depend to a large extent on the outcome of three brief enquiries. One is the apparent status of customary law as a source of law. Pacific Island countries operating under constitutions (currently there are 14 of them) may appear to have an advantage if the constitution acknowledges custom as a source of law, either directly, or by requiring legislative action to do so. Also, constitutional preambles and statements of principle that declare the fundamental nature of customary values and cultural heritage are intended to be taken into account in statutory interpretation. Of course, just how real and effective these constitutional provisions are will depend on political will to enact legislation and on the treatment they receive in the courts, as discussed in section C. below.

New Zealand's experience was complicated by the absence of constitutional definition and the need to examine early settlements such as the Treaty of Waitangi. According to Justice Heath, the promising start to the acknowledgement of Māori custom in the early days soon evaporated.[25] Much to the disgust of Frame, the Privy Council in 1941 closed off the Treaty as a point of entry for Māori customary law.[26] There is no reason in principle, however, why Māori custom should not be regarded as a free-standing source of law, in the manner of English common custom, subject to limitations. Joseph concluded his account of the early years with the observation that nearly 100 years passed after the Wi Parata decision[27] until the Waitangi Tribunal became the catalyst that "resurrected tikanga Māori customary laws and institutions" as well as "the 'principles' of the Treaty of Waitangi, significantly within the New Zealand legal system".[28]

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24 Farrar, this volume.
25 Heath J, this volume.
26 Frame, this volume.
27 Wi Parata v Bishop of Wellington (1877) 2 N Z Jur (N S) S C 79.
28 Joseph, this volume.

Hawai'i, as a state of the USA, also had its own story, as told by MacKenzie, and today the status of customary law stems from an 1892 statute and a 1978 constitutional amendment, empowering the courts to apply custom.[29]

The Samoan Constitution is important almost as much for what it does not say as for what it does. It acknowledges "custom and usage" as a source (art 111). On the other hand, it leaves space for traditional village councils to perform judicial as well as administrative and local law-making functions across the country. The constitutions of some other Pacific Island states also declare custom or customary law to be a source of law.[30] Another approach is that of the Fiji Constitution 1997 which requires Parliament to pass legislation to provide for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes (s 186). To date, this has not been done.

The second enquiry looks at the structure of the judicial system to make note of the jurisdictions that find and apply customary law. In some countries, such customary courts are established under the constitution. A more thorough study might seek to assess the knowledge, expertise and competence of judges in these jurisdictions. For present purposes, it is sufficient to observe, for example, that New Zealand possesses such a court – formerly the Native and now the Māori Land Court. The Samoan Constitution provides for a Land and Titles Court which applies customary law exclusively in relation to customary land and chiefly titles. The Land Division of the High Court of Cook Islands, as successor to the Land Court, is required by the Constitution (art 48) to apply custom to land cases. The Solomon Islands has Local Courts, and Customary Land Appeal Courts.[31]

The third enquiry steps back from law and its sources to survey the national polity in its entirety and make some generalisations as to the circumstances or spheres of activity in which customary law operates in the region. The objective is to see customary law in perspective, as part of the total legal system. Where, for what purpose and how widely is it used? In what situations is customary law an established "living law" reflecting people's needs, or where is it contesting space at the margins, perhaps in decline, or perhaps enjoying a revival? Although this third approach was not attempted by contributors to this volume, it is helpful as a means of placing the customary law situations in the countries under discussion within some sort of comparative framework.

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29 MacKenzie, this volume.

30 For example, Vanuatu Constitution 1980, art 95; and Papua New Guinea Constitution 1975, s 20 sched 2.1.

31 Local Courts Act (Solomon Islands) ss 3–16; and Land Titles Act (Solomon Islands) s 255.

In 1997, as part of an overview of customary law in the region,[32] I constructed a table of some 24 states and territories, and classified them according to certain criteria. Of course, a background question relevant to the survey, but unnecessary here, was whether indigenous society is broadly homogeneous in terms of culture and language, or multi-custom, comprising numbers of indigenous communities whose customs and language are distinct. To put the use of customary law into a quantitative perspective, the states mentioned in this volume may be classified according to whether the state in question –

(1) recognises a substantial body of unwritten or codified customary law in relation to most of the land area – eg Cook Islands, Fiji, Kiribati, Papua New Guinea, Samoa, Solomon Islands, Tuvalu and Vanuatu;

(2) recognises some customary law in relation to some land areas – eg New Zealand;

(3) recognises some unwritten customary personal law in relation to some marriages and adoptions – eg Papua New Guinea, Solomon Islands and Vanuatu;

(4) gives significant recognition to the authority of chiefs in government (national and/or local) – eg Fiji, Samoa and Tonga;

(5) gives some recognition to the authority of customary leaders in government activity – eg Cook Islands and Vanuatu;

(6) recognises some customary local law and/or settlement of disputes in criminal courts, local courts or land courts – eg Kiribati, Papua New Guinea, Samoa, Solomon Islands, Tuvalu and Vanuatu.

It is important to note, that, in theory at least, legal pluralism has been established as the norm, without the "setting apart" of districts within which indigenous laws should be observed, as in the case of North American "reservations". In New Zealand, 1852 provision for setting districts aside was not implemented, and was repealed in 1986.[33] Nevertheless, where a constitutional gap (Samoa) or lack of government services (Vanuatu) leaves village or island government entirely in the hands of local traditional councils, daily lives run according to customary law, regardless of the formal legal apparatus and national concerns of the State.

32 Guy Powles "Common Law at Bay?: The scope and status of customary law regimes in the Pacific" (1997) 21 The Journal of Pacific Studies 61, University of the South Pacific <www.usp.ac.fj/jps/abstracts21.html#21_3>.

33 Heath J, this volume; Farrar, this volume; and Joseph, this volume.

Thus, the customary law/legal system relationship is nowhere static. To the above analysis of current relationships must be added New Zealand initiatives aimed at pursuing new approaches to the engagement of custom in the organisation and management of the key social, economic and cultural affairs of traditional groups. Justice Durie wrote with enthusiasm in 2007 about proposals for waka umanga as "purpose-built statutory entities with corporate personality and perpetual succession" which would (1) represent the tribes, not replace them; (2) serve as servants of the tribes; and (3) pursue "tribal vision, not just a business ethic".[34] Criteria must be met, such as being "culturally compliant" and independent from government, and adopting policies directed towards fairness and good governance. In this volume, Justice Durie's discussion of the work of the Law Commission towards a Waka Umanga Bill, introduced in 2007, is followed by a saddening "Postscript" account of its demise in 2009, for which it seems responsibility should be widely shared.

### C. *Recognition of customary law and its ranking in the courts of the State*

As a general rule, and even if customary law is a source of law in its own right, the application of customary law in a matter before the court will be subjected to certain tests – unless, of course, the court has express jurisdiction to apply customary law, as mentioned above.

In this volume, Justice Heath and Frame, for New Zealand, and MacKenzie for Hawai'i, have usefully illuminated the approaches taken in the "common law" courts. The New Zealand tests imposed on custom to determine whether it will be applied (adopting Heath and Frame) are simplified here as "reasonableness, certainty, immemoriality and continuity". As one looks at experiences in the rest of the region, it is apparent that no two jurisdictions are the same and, further, that deeper research into each would probably produce useful contributions to judicial thinking generally. For example, there seems no reason in principle why the common law courts of several states should not adopt similar approaches, particularly at a time when many appellate court judges are selected from a regional pool, and when primary legal resources are available on the internet.

It must be remembered, however, that constitutions and statutes may have opened doors, or set hurdles for the application of custom, before the court's enquiry commences. MacKenzie has given Hawaiian examples of these.[35] Law-makers around the time of independence for Pacific Island states were aware that, by perpetuating the English common law heritage, they set up

34 Durie J, this volume.

35 MacKenzie, this volume.

inevitable competition with customary law, no doubt expecting that the latter would fade away over time. Methods were devised of ranking customary law against common law, sometimes in a way that set the bar high for custom.

In Samoa, "customs and usages" are defined by statute[36] as those being in force at the relevant time, whether as principles accepted by the people of Samoa in general, or as customs and usages accepted as being in force in respect of a particular place or matter. The Constitution also ranked "custom or usage" above English common law and equity, provided the custom or usage had "acquired the force of law in Samoa or any part thereof under any Act or a judgement of a Court of competent jurisdiction".[37] As the customary Land and Titles Court does not publish reasons for its judgments, it would be interesting to see research into how the common law courts deal with custom issues in the relatively few instances in which they are likely to arise.

Papua New Guinea and Solomon Islands each adopted two approaches in similar fashion. Taking the Solomon Islands example, the first approach places hurdles in the way of common law and equity, requiring that they should not be "inappropriate in the circumstances of Solomon Islands from time to time" nor, in their application to any particular matter, should they be "inconsistent with customary law applying in respect to that matter".[38] In the second approach, guidance is intended to be offered by statute as to how customary law, having been awarded a "free kick" against common law and equity, might get past the goal keeper.

The status of customary law may also be measured by the quality of the resources which sustain it as a body of knowledge, together with the accessibility of those resources. The Te Mātāpunenga Compendium will be a high-quality accessible resource. Judge Fox has taken on the task of reviewing the vast range of resources generally, in her comprehensive chapter. Particular attention is paid to historical research and to the growing bodies of material produced and made accessible by the Waitangi Tribunal and the Māori Land Court. She also points to the availability of material relating to Pacific Island customary law. I would add that, over recent years, the Law School at the University of the South Pacific has been the driver behind the development of a growing internet facility, Pacific Islands Legal Information Institute (PacLII), which offers online access not only to the primary statutes and cases of 20

36 Land and Titles Act 1981 (Samoa), s 2.
37 Constitution of Samoa 1962, art 111.
38 Solomon Islands Constitution 1978, s 76 sched 3.2.

Pacific Island states and territories (where one often finds very extensive use of customary law), but also to journals and other law-related material relevant across the region.[39] This brings us to the next sub-section.

## D. *Problems of proof*

One of the most significant challenges facing those who wish to see greater use made of custom in the courts of the nation is said to be the requirement that customary law be proved as fact, like foreign law. In New Zealand, Frame notes that it is the duty of the judges 'to discover and declare" the common law/customary law, that is to say, "the laws and usages of New Zealand".[40] However, as Justice Heath puts it, difficulties for custom stem from the fact that custom is generally not recognised as a "free-standing" source of law in its own right.[41] It is essentially a matter of different value systems. The judges are being called upon to find and apply substantive Māori customary law despite their own lack of fluency in Māori language and understanding of Māori culture.

Heath also points to ways in which these drawbacks may be mitigated, but refers to the "cascade of difficulties" involved in seeking to test the evidence of experts and parties, particularly where there are opposing views. From Young's chapter, one has the impression that a history of inappropriate attempts to test Māori land claims has created an unsatisfactory backdrop for current times.[42] Joseph brings us into the present through New Zealand legislation which has set up a litigious environment around wāhi tapu. This, as he shows so clearly, has created a rich resource for research into the interpretation of language and proof of custom.[43]

From the points of view of the litigants (or prosecution and defence), where the onus of proof of custom lies may be crucial. MacKenzie refers to the heavy burden on *civil* claimants and *criminal* defendants to establish the existence of constitutionally protected rights in Hawai'i.[44]

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39 See PacLII <www.paclii.org/>.
40 Frame, this volume.
41 Heath, this volume.
42 Young, this volume; and see under section II above.
43 Joseph, this volume.
44 MacKenzie, this volume.

A 2002 survey of the Pacific Island region concluded that the decided cases disclose several problems with proof of customary law as fact.[45] It suggested that none of the methods commonly used to prove custom as a fact seem consistently able to do so.[46] Furthermore, judges were frequently failing to make the distinction between the facts and the law in the case before them. They typically referred both to facts about actual customary behaviour and to evidence about a rule, as custom: both might be so, in an anthropological sense, but only the latter can be law.

The authors of the survey just referred to are also sceptical of a solution requiring judges to take judicial notice of customary law. They point out that it is alien to a judge's training to search for the unknown, and that the judge will, whenever possible, require the parties to inform the court. Three countries, Papua New Guinea, Tuvalu and Kiribati, require that, for the purposes of pleading and proof, custom is to be treated as law.[47] It would be interesting to see research on what difference this requirement has made to the operation of the courts of these countries.

The only state to have attempted to tackle the accommodation of customary law directly through legislative action is Papua New Guinea where diversity of sources and problems of proof had long been recognised. The 1975 Constitution directed the adoption by statute of provisions which would implement the concept of an "underlying law".[48] The obligation was to be placed upon the National Courts to develop the underlying law "as a coherent system appropriate to the circumstances of the country from time to time". No legislation was passed, and custom continued to be proved as fact until the Underlying Law Act 2000 articulated a scheme that requires the courts to apply sets of formulae to the matters before them in order to arrive at the underlying law. To mention a few features briefly, customary law takes precedence over common law if the subject matter is known to customary law; customary law is to be ascertained as a question of law; counsel appearing are under a duty to assist the court by producing information and opinion in written form as well as by calling evidence; and the court is given wide discretion as to the writings it may consider, and the evidence and opinion it may obtain of its own motion.[49] The rest of the region is watching, and research is needed to assess how the concept is addressing the conflicts of norms inherent in the exercise.

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45 Jean Zorn and Jennifer Corrin Care "Proving Customary Law in the Common Law Courts of the South Pacific" *Occasional Paper Number Two* (The British Institute of International and Comparative Law, London, 2002).

46 Ibid, 47.

47 Ibid, 13.

48 Constitution of Papua New Guinea 1975, ss 20, 21 sched 2.

49 Underlying Law Act 2000 (Papua New Guinea), ss 4, 15, 16.

As for those courts which are established and staffed to apply customary law, as a significant or exclusive jurisdiction, there is much scope for study across the region. Fortunately, readers of this volume are provided by Suaalii-Sauni with sharp insights into the manner and style of Samoa's Land and Titles Court, where custom is a free-standing source and its judges are senior Samoan non-lawyer citizens led by a Samoan judge as President. In particular, Suaalii-Sauni highlights the importance of the assumption of knowledge in a party's presentation of its case to the Court.[50] She asks "How does the Court assess the authenticity of a gafa [genealogical record] and its corroborating evidence?", and concludes that, even after research, it is "hard to tell". Understanding the significance of what is "not said" in the context of the exercise of pule (authority) and studying key conversations recorded on the Court file are examples of skills and strategies necessary for interpreting Court outcomes. Suaalii-Sauni is concerned that decisions by judges or chiefs should not be "inexplicable", that the certainty asserted may not in fact exist, and that the discourse may "operate more to confound or subjugate than to empower". She has lent support to the reminder issued by several writers in this volume as to the difficulty of discerning the genuineness of custom, but her call returns to the context of Samoan custom itself as offering "our closest connection" to working out solutions "as honestly and openly as possible".

## IV. Conflicts of Norms, Erosion of Custom and the Future

Taking a regional view in the spirit of the 2007 Symposium, it is clear that the resurgence of pride in ethnic identity, culture and language which accompanied decolonisation and the new status of many Island people gave impetus to research and policy-making that resulted in the formal recognition of customary law in diverse ways, as have been discussed. But the same period also witnessed the promulgation of "universal" norms and the rise of globalisation forces which were inconsistent with or contradicted the cultural norms of kinship-based societies, their leadership traditions, dispute settlement practices and principles of land tenure.

For New Zealand and Hawai'i, the character and timing of the causes of erosion of indigenous law were somewhat different, the major factors lying in the demographics, politics and economics of minority status. We now see, however, that this status has been a stimulant, particularly to pursue the study of language and custom, and their part in the legal system. On the other hand, many Island states, having secured to varying degrees, recognition of custom

50 Suaalii-Sauni, this volume.

in the legal framework, appeared somewhat complaisant where language and custom were concerned. It was natural that the new states would focus on political and economic issues.

Across the region, evidence of the erosion of custom norms and long-held cultural values is visible everywhere. The most obvious signs flow from the increased autonomy of the individual in a cash economy at the expense of kinship obligation and from demands upon the control and use of customary land rights (as mentioned for Hawai'i and New Zealand in this volume). Less obvious but perhaps equally challenging in the long run is the issue of gender, together with other grounds for the successful exercise of universal human rights in the face of customary law. Claire Slatter's regional study demonstrates that the momentum for change in traditional attitudes is gradually building.[51] It seems clear from her account, however, that solutions to conflict are seldom decided in the courts. After all, they are not intended to be agents of change, and the occasional decisions of the courts, often staffed by foreigners, are no measure of progress or lack of it.

To sum up, the prognosis for customary law as presented in this volume is positive. The juggernaut of globalisation will not be the devastating tsunami that some people feared if social and political will can be further engaged and directed. This volume offers the following signposts – and I do not presume to be able to articulate them as well as the authors.

(a) The centrality of language and culture requires no elaboration, and the publication of the Te Mātāpunenga Compendium will provide an accessible resource for all New Zealanders. But the signpost will not then come down, although it might divide to indicate new directions.

(b) In the Preface, Justice Baragwanath called upon Māori to "take positive steps in their own and in the wider public interest". In what innovative ways might the Compendium be employed?

(c) For the Pacific Island states, the Māori *Te Mātāpunenga* initiative demonstrates techniques that deserve a closer look. Several countries are already progressing with the study of their own language and culture but cost limits such programmes, and the connection with customary law requires development. The advance in understanding between New Zealand and the Island states will be mutual, as indicated by the Governor-General in his opening remarks at the Symposium and supported by several authors.[52]

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51 Slatter, this volume.

52 Hon Anand Satyanand, this volume; Fox J; Aikman; Slatter, this volume.

(d) Mutual adaptations between customary law and human rights law deserve to be pursued as recommended by Slatter and Aikman. In this respect, further study is required of the resilience of custom and its capacity for change in light of Aikman's view that custom is not inherently conservative.

(e) The inferior legal status of women in many societies continues to represent a failure that demands redress alongside change in social values.

(f) Techniques whereby customary law and common law might co-exist as sources of law, to be found by the judge rather than proved, might be researched. Such a programme would also examine the function and duty of counsel to assist the court, and what resources and discretion should be available to a judge who is seeking to find the law, and whether this process is satisfactory. Allied to this research might be an examination of how customary law is found in courts working with customary law jurisdictions.

(g) Signposts for the judicial system in New Zealand and in many countries of the region would indicate the need for the education of judges in cultures other than their own, preferably with language training. More broadly, this issue includes "hostility to custom" (Frame et al.) and "institutional unwillingness to let go" (Heath).

(h) Work on the waka umanga concept in New Zealand has drawn attention to a significant sphere of customary law activity beyond the courts, namely customary governance. There is much scope for reciprocal study between New Zealand and Island countries of initiatives where systems of political organisation, economic management and social control are based on custom.

Finally, the call again goes out for research and education. I am sure that the most fitting reward for the authors of the 2007 Symposium collected here would be support for the continuation of their work and for further initiatives in New Zealand and across the region directed towards the greater understanding and usefulness of customary law. Along with this objective will be the mutual appreciation of the uniqueness of each society and polity, and recognition of the value of studying the experiences of others, and lessons learnt.

As Justice Baragwanath put it, "Tūhonohono, or bonding together, expresses perfectly the vision of a cohesive New Zealand jurisprudence". In the meantime, Te Mātāhauariki Institute has demonstrated that Tūhonohono gives meaning to the joint nature and common spirit of its multifaceted enterprise, the 2007 Symposium published in this volume.

# Notes on Contributors

**Helen Aikman QC** was admitted to the bar in 1982 and has an LLB (Hons) from Victoria University of Wellington and a BA from the University of the South Pacific in Suva, Fiji. She specialises in public law, including constitutional and international law issues, human rights and regulatory matters, and Treaty of Waitangi issues. She was a Law Commissioner with the New Zealand Law Commission, where she was involved in reports on Māori governance, custom and human rights in the Pacific and the reform of law relating to public inquiries. Previously, she worked for 10 years at Crown Law Office as a member of the Treaty and International team, leader of the Commercial Regulatory team and Deputy Solicitor-General (Constitutional). Helen has represented the Government in a number of major Treaty and other cases. She was appointed as a Queens Counsel in 2005. For many years she represented the New Zealand Government at meetings of the Pacific Islands Law Officers Network (PILON) and has been a faculty member for the PILON and NZLS litigation skills courses. She has also worked as a Principal State Solicitor in Samoa and in Wellington firms, where she had a general civil and criminal law practice.

**Hon Sir David Baragwanath KNZM, QC** was appointed a Judge of the High Court of New Zealand in 1995, President of the New Zealand Law Commission in 1996, and to the New Zealand Court of Appeal in 2007, stepping down from the New Zealand bench in July 2010. After graduating from the Auckland University Law School he obtained a Rhodes Scholarship and earned a Bachelor of Civil Law from Oxford University. He practised first as a partner in the law firm Meredith Connell and then as a barrister. He also became a New Zealand member of the Permanent Court of Arbitration at The Hague. In October 2010, it was announced Justice Baragwanath had been appointed one of five appeal judges of the United Nations Special Tribunal for Lebanon. Judge Baragwanath was elected President of the Tribunal on 10 October 2011, following the retirement of Judge Antonio Cassese on grounds of ill health. He was appointed Queen's Counsel in 1983 and made a Knight Companion of the New Zealand Order of Merit in the New Year Honours announced on 31 December 2010.

**Richard Benton** studied history at the University of Auckland (BA 1960) and aspects of Northern Māori tradition and political history under the guidance of some senior traditional experts before completing an MA (1968) and PhD (1972) in Linguistics at the University of Hawai'i (Mānoa). After finishing his doctoral fieldwork he spent a year in Sulu, Philippines (1970-71) as a consultant on social science education at Notre Dame of Jolo College. He then spent 25 years with the New Zealand Council for Educational Research (1971-

1996) and wrote and lectured extensively in New Zealand and internationally on language policy, bilingual education and related matters, with a focus on the status of local and international languages in education and government. He was also one of the New Zealand representatives to the Polynesian Languages Forum at its initial meetings in Aotearoa, Tahiti and Hawai'i. In 1991 he was Sumi Mackey Alumni Fellow at the East West Center. More recently he has been Deputy Director of the Centre for Maaori Studies and Research of the University of Waikato (1996-1999), Director of the James Henare Māori Research Centre at the University of Auckland (1999-2003), and Adjunct Professor with Te Mātāhauariki Institute at the University of Waikato (2004-2007). He is currently President of the Polynesian Society, an Honorary Lecturer in the Faculty of Law, the University of Waikato and a member of the International Advisory Panel of Terralingua.

**Hon Sir Edward Taihakurei Durie KNZM** graduated with a BA, LLB from Victoria University in 1964 and was a partner in the firm of Murray, Dillon, Gooch & Durie in Tauranga from 1964 to 1974. He was appointed a judge of the Māori Land Court in 1974 and Chief Judge of the Court from 1981 to 1998. Also in 1981 Justice Durie became Chairman of the Waitangi Tribunal and held this position until 2002. In 1998 he was appointed to the High Court bench in Wellington and took up a position in the Law Commission in July 2004. He is now in active retirement based in the Wellington region.

**John Farrar** LLB (Hons), LLM, LLD (University of London), PhD (University of Bristol) is currently Emeritus Professor of Law, Bond University, Queensland, Professor of Corporate Governance at The University of Auckland Business School and joint Director of the New Zealand Governance Centre. He has extensive experience in commercial law reform; is general editor of *Company and Securities Law in New Zealand* (Thomson Brookers) and the author of *Corporate Governance: Theories, Principles and Practice* (OUP). Professor Farrar was previously Dean of Law at the University of Canterbury, Bond University and the University of Waikato. He was a member of the Legislation Advisory Committee 2004-2008.

**Hon Caren Fox**. Deputy Chief Judge Caren Fox (née Wickliffe) was appointed in 2000 as a judge of the Māori Land Court resident in the Tairawhiti and Waiariki districts. She was also appointed as an Alternate Environment Court judge in 2009. Prior to her first appointment as a judge, she had been a lecturer in law at Victoria University, and a Senior Lecturer in law and Director of Graduate Studies at the University of Waikato. In addition, she acted as legal counsel for Treaty claimants and Māori land clients. She was appointed Deputy Chief Judge of the Māori Land Court in February 2010. A specialist in international human rights, Judge Fox was a Harkness Fellow to the USA

from 1991 to 1992 and a Pacific Fellow in Human Rights Education employed by the Commonwealth Fund for Technical Co-operation 1997-1999. For her work in human rights she won the New Zealand Human Rights Commission 2000 Millennium Medal. Judge Fox was appointed to the Waitangi Tribunal in 2000. She has been a presiding officer for the Aquaculture claims, the Te Arawa Mandate and Settlement claims, the Haane Manahi claim and the Central North Island Stage 1 claims. She is currently the presiding officer for the Central North Island Stage 2 claims, the Porirua ki Manawatu claims and the Kōhanga Reo Urgent Inquiry.

**Dr Alex Frame** LLD (VUW) is a barrister and public law teacher, and advises extensively on constitutional questions in the South Pacific, and on Treaty of Waitangi matters in New Zealand. Most recently he has been Professor of Law at the University of Waikato, and Director of Te Mātāhauariki Research Institute, engaged in a study of customary law. His biography of Sir John Salmond (1862-1924), *Salmond: Southern Jurist*, was published by Victoria University Press in 1995 and was awarded the E.H. McCormick Prize at the 1996 Montana Book Awards as well as the University of Auckland Law Foundation's J.F. Northey Prize for best legal publication in the same year. In 2002 Alex completed a study of the way in which our legal system might better reflect Māori customary law: *Grey and Iwikau – A Journey into Custom* was published by Victoria University Press in that year.

**Hon Justice Paul Heath** graduated LLB in 1978 from the University of Auckland. He was admitted to the bar in 1978 and joined the Department of Justice at Auckland as an investigating solicitor. In 1981 he moved to Stace Hammond Grace and Partners and became a partner of the firm in 1983. He was admitted to the Australian Capital Territory bar in 1990. He retired as a partner of Stace Hammond Grace and Partners in 1995 but continued his association with the firm as a consultant until commencing practice as a barrister sole in 1998. Justice Heath was a consultant to the New Zealand Law Commission from 1997 to 1999 and was then appointed a part-time Commissioner for three years. He was appointed Queen's Counsel in 1998 and a High Court judge in 2002. He sat as a Judge of the Court of Appeal of Vanuatu in 2011. Justice Heath is based at the Auckland High Court.

**Robert Joseph** graduated LLB in 1996, and LLM in 1998 at the University of Waikato; and was admitted to the Bar as a Barrister and Solicitor of the High Court of New Zealand in 1998. He was a senior research fellow for the Te Mātāhauariki Research Institute at the University of Waikato under the leadership of Judge Michael Brown and Dr Alex Frame. In 2006 he became the second Māori – and the first Māori male – to graduate with a PhD in Law. Dr Joseph is currently a law lecturer at Te Piringa-Faculty of Law at

the University of Waikato. Dr Joseph's research interests include: Māori and Indigenous governance; Indigenous Peoples' internal self-determination rights and responsibilities; Indigenous water rights; the interface of traditional Māori knowledge systems and Western science; Canadian and North American Indigenous studies; Treaty of Waitangi settlement processes and post-settlement development; constitutionalism, and land law. He is currently writing a biography of his paternal tūpuna (ancestors) who fought at the 1864 Battle of Orakau during the Waikato Wars.

**Melody Kapilialoha MacKenzie** is an Associate Professor of Law and Director of Ka Huli Ao Center for Native Hawaiian Law at the William S. Richardson School of Law, University of Hawai'i at Mānoa. After receiving her law degree in 1976, Professor MacKenzie served as a law clerk to Chief Justice William S Richardson of the Hawai'i Supreme Court. In 1980, she joined the staff of the Native Hawaiian Legal Corporation (NHLC), a public interest law firm protecting and advancing the rights of Native Hawaiians. She served as NHLC's Executive Director and as a senior staff attorney. Currently, Professor MacKenzie teaches Native Hawaiian Rights, the Native Hawaiian Rights Clinic, and Legal Writing. She is also project coordinator and chief editor for the forthcoming second edition of the *Native Hawaiian Rights Handbook*, which she originally edited and helped to write, and is a contributor to the 2005 edition of Felix S Cohen's *Handbook of Federal Indian Law*. She has worked on cases asserting Hawaiian traditional and customary rights, dealing with land issues, and defending the constitutionality of Native Hawaiian programmes.

**Guy Powles** BA, LLB, LLM (Hons) (VUW), PhD (ANU), is a Senior Research Fellow in the Faculty of Law, Monash University, Melbourne, having retired from teaching in 2001, and is currently engaged in consultancies and the supervision of theses on Pacific topics. His primary field of interest is the law and custom of the peoples of the Pacific Islands (including PNG), and the historical development of their constitutions, having particular regard to the interaction between cultural values and traditional institutions, on the one hand, and Western legal concepts and notions of the state, on the other. He has practiced law in New Zealand (1958-74), the UK (1971) and Australia (1979-99), and held judicial appointments in Samoa and the Federated States of Micronesia. At Monash he taught Pacific Comparative Law for 20 years and helped to develop the clinical law programme while teaching subjects concerning the legal profession and legal ethics. Dr Powles was visiting fellow at the Universities of Warwick and Hawai'i, and involved in the establishment of the Law School of the University of the South Pacific in Vanuatu where he taught Customary Law for several years and supports research. Dr Powles has regularly presented papers at regional conferences, including annual meetings

of Pacific Islands Legal Officers Meetings (PILOM) and Australasian Law Teachers Association (ALTA). He has most recently served as constitutional consultant to the governments of Tonga and Nauru.

**Wayne Rumbles** graduated BA/LLB in 1997 with a major in History and English Literature. He completed LLM (Distinction) from the University of Waikato in 1998. He spent three years working in community law and worked for Te Mātāhauariki Research Institute for 10 years on the Laws and Institutions for Aotearoa/New Zealand project. Mr Rumbles is a Senior Lecturer in Law at the University of Waikato and teaches in the areas of Crime, Criminology and Evidence. He also teaches the specialist fourth and fifth-year papers in Cyber Law. His research and supervision interests include new technologies as they interface with the law; Indigenous rights especially in relation to criminal law; Media and the law; Cyber-Crime especially in relation to Virtual Worlds, Human Trafficking, Organised Crime, and Sentencing of criminal offences.

**Sir Anand Satyanand GNZM**, QSO, KtStJ was the 19th Governor-General of New Zealand. He graduated with a Bachelor of Laws from the University of Auckland in 1970. He worked as a lawyer for the next 12 years, initially for Greig, Bourke and Kettelwell. Later he worked as a barrister for the Crown Law Office. He served on the Council of the Auckland District Law Society from 1979 until his appointment as a judge of the District Court of New Zealand in 1982. In 1995 he was appointed an ombudsman and he served two five-year terms. Between 2005 and at the time of his appointment as Governor-General he chaired the Confidential Forum for Former In-Patients of Psychiatric Hospitals. He was a member of the Advisory Panel to Te Mātāhauariki Institute from 1998 to 2006.

**Claire Slatter**, PhD is the Head of the School of Social Sciences at the Fiji National University where she teaches ethics. She attained her PhD in Public Policy from Massey University and her MA in Political Science from the Australian National University. She taught politics for 17 years at the University of the South Pacific, where she attained her first degree. Claire has a background in feminist, anti-nuclear, trade union and constitutional activism and is a founding member of the Citizens' Constitutional Forum in Fiji. She is also a founding member, and Chair of the Board, of the South feminist network Development Alternatives with Women for a New Era (DAWN).

**Dr Tamasailau Suaalii-Sauni** (PhD Sociology, LLB, University of Auckland) is currently a Senior Lecturer with the Vaaomanu Pasifika Unit, Pacific and Samoan Studies Programmes, School of Social and Cultural Studies, Faculty of Humanities and Social Sciences, Victoria University of Wellington. From 2009 to 2011 she was based as a Senior Research Fellow at the National University of Samoa (NUS) in Vaivase, Upolu, working for the Centre for

International Health, University of Otago, in partnership with NUS. Prior to moving to Samoa, Tamasailau also worked for the University of Auckland as Deputy Director for the Centre for Pacific Studies, Lecturer for the Department of Sociology and Research Fellow for the then Department of Maori and Pacific Health. She also held a Senior Pacific Researcher role with the Clinical Research and Resource Centre, Waitemata District Health Board, Auckland. Her research and teaching interests are in Pacific jurisprudence, Samoan indigenous knowledge, research methodologies, gender studies and mental health. Tamasailau is of Samoan descent and has genealogical connections to the villages of Saoluafata, Salani, Saleaumua, Samusu and Iva. She currently lives in Wellington with her husband Sinapati Sauni and daughter Tineifaualii.

**Grant Young** is the principal researcher at The History Workshop Limited and an Honorary Research Associate at Massey University. He was awarded a PhD by Massey University in History, completed in 2003, for a thesis which examined the Native Land Court and its treatment of Māori custom from 1862 to the 1920s. Dr Young also holds a Master of Arts with First Class Honours (1999) and a Bachelor of Arts (1996) from the University of Auckland. Since completing his doctorate he has worked fulltime as a researcher dealing primarily with the Court and Māori custom relating to land. Much of this work has been undertaken for Māori claimants in the Waitangi Tribunal process or Māori organisations looking to settle their treaty claims in direct negotiations with the Crown. He has also published a number of articles in refereed journals and edited collections dealing with aspects of the Native Land Court and presented several papers at conferences of historians and legal scholars on the Court and the modern treaty settlement process.