

THE HARKNESS HENRY LECTURE

**LEX AOTEAROA: AN HEROIC ATTEMPT TO MAP
THE MĀORI DIMENSION IN MODERN NEW ZEALAND LAW**

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In the title to this lecture I promised to make an heroic attempt at mapping the Māori dimension in modern New Zealand law. It turns out there was nothing heroic in this mapping job at all. It just involved a whole lot of hard work. It also turns out that you should never come up with a name for a lecture before having written it. The name hooked me into a job that was not only hard work, but fraught with risk. The biggest risk was that I would end up simply delivering a summary of the different categories of modern law in which there is a Māori element or dimension. This would be both boring and superficial – a lecture a mile wide but only an inch deep. Another risk is that once the map is laid out it might become obvious that the Māori categories or dimensions in modern law are islands separate from and unrelated one to the other; that the mapping exercise might provide no additional insight because the various Māori parts of the whole law are really silos unto themselves. So why do it?

Well, nearly five years ago I changed careers. I transited from a 20-year career as a specialist practitioner and judge in Māori issues law, into the life of a generalist. That transition has reminded me that the law is a *whole* system with common threads and elements running over, through and underneath its broad and complicated geography. Being a specialist required me to think about Māori land and the Treaty of Waitangi in a deep way. Being a generalist has made me think about those issues in a more connected way: as parts of that much larger whole. So it was the transition that got me thinking about whether it is possible in the 21st century to say there is a coherent dimension in New Zealand's law called Māori law, parts of which are subjects in their own right and often internal to the Māori world (Māori land law, the Treaty and Treaty settlements law, and common law aboriginal title). But there is a much bigger part that is really a gloss on general legal categories, affecting both the Māori world and the wider community as part of everyday life. If so, is it possible to map both ends of this Māori law thing and thereby to describe its effect on the wider subject? And if that is possible, is it also possible to predict the ways in which that map may change, develop or even expand into the future? In this lecture I set out to answer some of these questions. I do not promise that the answers will be satisfactory, and I certainly do not promise that they will be final. What follows is nothing but a first attempt at joining dots that have perhaps previously remained unconnected. Whether they are the right dots joined in the right way very much remains to be seen. I will be very happy if these thoughts start a bigger discussion.

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I. THE FIRST LAW OF AOTEAROA

In order to begin this exercise, it is necessary to reach back in time to the arrival of the first law of Aotearoa as accurately so described by Ani Mikaere in her article *The Treaty of Waitangi and Recognition of Tikanga Māori*.¹ This is the law brought across vast ocean distances by Kupe and Toi and others from their respective home islands in the tropical Pacific to these shores a millennium ago. Understanding this law (more accurately *these* laws for the laws were distinct in each source island) and its cultural drivers, helps to explain why this first law continues to force its way to the surface in the unimaginably different circumstances of modern New Zealand.

In the Wai 262 Report, the Waitangi Tribunal described the system of custom that Kupe brought with him in these terms:²

Its defining principle, and its life blood, was kinship – the value through which the Hawaiians expressed relationships with the elements of the physical world, the spiritual world, and each other. The sea was not an impersonal thing, but an ancestor deity. The dots of land on which the people lived were a manifestation of the constant tension between the deities, or, to some, deities in their own right. Kinship was the revolving door between the human, physical, and spiritual realms. This culture had its own creation theories, its own science and technology, its own bodies of sacred and profane knowledge. These people had their own ways of producing and distributing wealth, and of maintaining social order. They emphasised individual responsibility to the collective at the expense of individual rights, yet they greatly valued individual reputation and standing. They enabled human exploitation of the environment, but through the kinship value (known in te ao Māori as whanaungatanga) they also emphasised human responsibility to nurture and care for it (known in te ao Māori as kaitiakitanga).

Of course, in the beginning things were a little more complicated than that. A score of ocean-going waka followed Kupe from both his island and different islands and villages throughout eastern Polynesia. So the detailed systems of tikanga they brought with them varied between waka. And those variations remained with the descendants. As Buck said many years ago, iwi are, in heart and mind, a series of islands connected by land. But the underlying values of these old island cultures were, and remain, universal and simply stated. They melded, adapted and changed in important ways after arrival, in response to the very different environment of these temperate islands located at the hinge of the southern hemisphere's weather systems. In that sense Māori culture and Māori law is, in its distinctive aspects, entirely a product of the interaction between those old Hawaiians and this place. Te reo Māori was imagined out of the whenua, flora and fauna of this place as new words were needed to explain things newly experienced. The canoe and longhouse technology Kupe's descendants developed was possible because of the great forests and necessary because of the cooler climate in this place, and so on. The economy changed to accommodate a place with four distinct seasons and a growing period for gardens of only a few months.

The system of law that emerged from the baggage Kupe's people brought and the changes demanded of his descendants by the land itself have come to be known as tikanga Māori: "tika" meaning correct, right or just; and the suffix "nga" transforming "tika" into a noun, thus denoting the system by which correctness, rightness or justice is maintained. That said, tikanga and law are

1 Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 330.

2 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 5.

not co-extensive ideas. Tikanga includes customs or behaviours that might not be called law but rather culturally sponsored habits. Where the line is to be drawn between the two need not deter us here. That is a legal anthropological debate for another time.

Professor Sir Hirini Moko Mead, a tikanga expert and academic in the western sense, describes tikanga in the following comprehensive way:³

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

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

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

That said, to understand tikanga one must first understand the core values reflected in its directives. It must be remembered that tikanga Māori is law designed for small, kin-based village communities. It is as much concerned with peace and consensus as it is with the level of certainty one would expect of normative directives that are more familiar in a complex non-kin-based community. In a tikanga context, it is the values that matter more than the surface directives. Kin group leaders must carry the village with them in all significant exercises of legal authority. A decision that is unjust according to tikanga values risks being rejected by the community even if it is consistent with a tikanga-based directive.

There is considerable debate about what should be in the list of generally applicable core values the holders of the first law brought, adapted and still hold. See generally, for example, the intense debate between experts reflected in the Law Commission's 2001 Study Paper *Māori Custom and Values in New Zealand Law*.⁴ But for what it is worth, this is my list:

- *whanaungatanga* or the source of the rights and obligations of kinship;
- *mana* or the source of rights and obligations of leadership;
- *tapu* as both a social control on behaviour and evidence of the indivisibility of divine and profane;
- *utu* or the obligation to give and the right (and sometimes obligation) to receive constant reciprocity; and
- *kaitiakitanga* or the obligation to care for one's own.

3 Hirini Moko Mead "The Nature of Tikanga" (paper presented to Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11–13 August 2000) at 3–4 as cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [72].

4 Law Commission, above n 3, at [124]–[166].

Of these, whanaungatanga is the glue that held, and still holds, the system together; the idea that makes the whole system make sense – including *legal* sense. Thus the rights in cultivable land and resource complexes such as rivers, fisheries, forests, swamps and so on are allocated by descent from the original title holder (*take tupuna* – literally ancestral right or source). There is a form of legal interest created by conquest (*raupatu* – literally the harvest of the war club) and even, though more rarely, transfer (*tuku* – literally to give up). But these variants are better understood as the foundation of a right rather than rights in themselves. They were, in practice, fragile until consummated (literally) by creating a connection to, and then spring-boarding off, the line of the original ancestral right holder. So a “conquest” always involved formal making of peace through inter-marriage and assimilation of the old descent line into the new in order to remove later contestation about whether the newcomer held the primary right (history taught the makers of custom law that conquered hapu rebuilt and reasserted their rights unless properly accommodated in the new order of the conqueror). *Tuku* was never a one-off transaction in the way a contract is, but rather a means of incorporating the transferee into the community of the original title holder.⁵

So whanaungatanga might be said to be the fundamental law of the maintenance of properly tended relationships. The reach of this concept does not stop at the boundaries of what we might call law, or even for that matter, human relationships. It is also the key underlying cultural (and legal) metaphor informing human relationships with the physical world – flora, fauna, and physical resources – and the spiritual world – the gods and ancestors.

Thus the story of what happened to Rata when he felled his totara tree without proper procedure confirms that good relations must be maintained with the forest itself as a related descent group in order to maintain the human right to be a user of forest resources.

In a more prosaic context, the requirement to maintain *ahikā* (literally burning fires) – to continue to use resources in order to maintain the descent-based rights in them – makes the same point.

No right in resources can be sustained without the right holder maintaining an ongoing relationship with the resource. No relationship; no right. The term that describes the legal obligation is *kaitiakitanga*. This is the idea that any right over a human or resource carries with it a reciprocal obligation to care for his, her or its physical and spiritual welfare. *Kaitiakitanga* is then a natural (perhaps even inevitable) off-shoot of whanaungatanga.

The point is that whanaungatanga was, in traditional Māori society, not just about emotional and social ties between people and with the environment. It was just as importantly about economic rights and obligations. Thus rights depended on right holders remembering their own descent lines as well as the descent lines of other potential claimants to the right. Whakapapa was both sword and shield wielded by Māori custom lawyers. It remains so today.

Similar ideas infused what might now be called either criminal or tort law. The criminal/tort law institution of *murū* demonstrates the point. In traditional Māori society, a transgression of another person’s personal or possessory rights would see the victim’s whanau levying *murū* on the property of the transgressor’s whanau. This would be done with due and public ceremony, demonstrating the support of the hapu for the penalty. Literally taxing the perpetrator’s whanau for the trespass; sometimes summarily, and sometimes after much discussion and debate about appropriate compensation and from whom. A particularly egregious wrong, or a particularly

⁵ See, for example, Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997).

important victim, might even ratchet up the level of the *mu* from the usual whanau level action to hapu level. And in the most serious of cases it might even lead to forfeiture of land.

The accidental killing of one of my ancestors by a member of the Parawhau of Whangarei led to the latter hapu transferring land to my section of Ngati Pukenga to *mu* (make good on) the *hara* or wrong. The land is still in Ngati Pukenga ownership today. And as the whanaungatanga value dictates, the Ngati Pukenga families who have lived there since that time are deeply intertwined now with Parawhau and Ngati Wai descent lines.

In the 19th century *mu* was described in English by the settlers as plunder, giving the impression that it was a random act of violent theft. It was of course nothing of the sort. Rather, it was a civil/criminal remedy – indeed the primary legal remedy for transgressions of the kind I have described. And it was community sanctioned.

The important point in terms of the whanaungatanga value is that wrongs were not seen as individual wrongs. They were seen as the responsibility of the perpetrator’s wider kin group. And the more serious the wrong, the wider the kin net that became hooked into the compensation equation. Equally the victim was not just the individual involved but his or her kin group, the parameter for which was set by the status of the victim and the seriousness of the wrong. So *mu* was not a system of individual to individual compensation or correction as in tort, or even individual to community as in crime. It was an aspect of the whanaungatanga value: it operated kin group to kin group. No one was ever just an individual.

The traditional Māori family law institution of *whangai* (traditional adoption)⁶ is another example of whanaungatanga in operation. In western law adoption is primarily a legal technique for dealing with children who, for whatever reason, lack a parent or parents. Apart from adopting step-parents, most modern adoptions are still stranger adoptions and the default position is that the adoption is “blind”. In tikanga Māori, the institution of *whangai* is a technique for cementing ties among members of whanau and hapu located at different points in the whanaungatanga net, and for ensuring the maintenance of tradition between generations; the latter, by placing young children with elders to be educated and raised in Māori tradition. Thus to be a *whangai* in tikanga Māori is not to be abandoned – quite the opposite. It is to be especially selected as someone deserving of the honour. Stranger adoption was completely unheard of and would be considered abhorrent in a system that valued kinship above all else. A form of banishment.

So the first law in Aotearoa is an old system built around kinship that was adapted to the new circumstance of this place. It was internally coherent and clear. But, being primarily value-based rather than prescriptive, it was flexible: law for small communities in which making peace was as important as making principle. In modern corporate parlance, the first law of Aotearoa was fit for purpose.

II. THE SECOND LAW OF NEW ZEALAND

When the British arrived 700 years later they brought an entirely different conception of law and its underlying values. By the 19th century the focus in that system was increasingly what we now call the liberal value of the autonomy of the individual. Important economic relationships were primarily defined by contract rather than kinship – the concept in theory at least, of an agreement defining both the objective and the rules of a relationship entered into between autonomous individuals

⁶ “Whangai” is the verb to feed.

exercising self-determination through free choice. That is not to say that social relationships – and kinship of course – were unimportant in that system. That would be quite wrong. It is rather that by the time that the enlightenment and then the industrial revolution had captured European and North American economic enterprise, the autonomous individual was the primary building block of wealth. And the Lockean concept of property had come to define the relationship between those theoretically autonomous individuals and their capital, land and other natural resources. Law and government, Locke said, could be justified only as mechanisms to protect private property.

As Locke was at pains to point out, a key – perhaps *the* key – characteristic of property is its free alienability, a necessary incident of the personal autonomy at the heart of the idea.

So by this stage in the evolution of western, and particularly British values, the autonomous individual freely interacting with others was the operative cultural myth (I use myth without pejorative intent). The law expressed this through contractarian theories of human relationships and proprietorial conceptions of rights in wealth including natural and physical resources. In fact the contract metaphor was also used increasingly to define the relationship between citizens and the state – at least after the reformation and the revolutions in America and France. Though the British were subjects not citizens, even they were increasingly seen as ruled only by their agreement to be ruled.

It comes as a surprise to lay people these days that the non-contractarian general law of negligence does not enter the common law lexicon until *Donoghue v Stevenson* – well into the 20th century.⁷ Even then, as Lord Atkin conceived of it, the obligation underlying it was cultural – indeed biblical – in origin. He called it the neighbourhood principle. He perceived it as a necessary limit on the default position of individual autonomy. Necessary he said, in light of complex post-industrial revolution life in modern western society. It was still seen as highly controversial in its time such was the hegemony of contract as definer of legal relationships.

So the fundamental difference between the respective values of the first law and the second law was really that one was predicated on personal connectedness (and through that group autonomy) and the other was predicated on personal autonomy (and through that group welfare).

A. Collision

These two systems collided here in the middle of the 19th century. The clash was the focus of issues thrown up by the Muriwhenua Land Claim reported on by the Waitangi Tribunal in 1997. This related to pre-Treaty land transactions between Māori and the earliest settlers in the Far North during the decade prior to 1840 and the formal arrival of the second law. The question was, were these land transactions *tuku* (transfers predicated on the maintenance of healthy relationships between transferor and transferee and therefore necessarily defeasible according to Māori custom), or were they transfers in the Lockean legal culture – one-off, autonomous and final? The Waitangi Tribunal said very firmly that they were the former.

In finding the answer, the Tribunal's view was context is everything. As Professor Dame Anne Salmond said in her evidence to the Waitangi Tribunal:⁸

It should be stressed that in 1840 in Northland, Māori were operating in a world governed by *whakapapa* (genealogical connections). Ancestors intervened in everyday affairs, *mana* was

⁷ *Donoghue v Stevenson* [1932] AC 562 (HL).

⁸ Waitangi Tribunal, above n 5, at 23.

understood as proceeding from the ancestor-gods and *tapu* was the sign of their presence in the human world. Life was kept in balance by the principle of *utu* (reciprocal exchanges), which operated in relations between individuals, groups and ancestors.

Her point was that when the settlers arrived in Muriwhenua in the 1830s the land was not empty of law. Kupe's law held sway. The point made repeatedly by the Waitangi Tribunal was that the first law did not evaporate when settlers arrived.

B. The Treaty of Waitangi at the Point of Contact between the First and Second Laws

At the end of that decade there was the Treaty of Waitangi itself, the mechanism through which these two systems of law would be formally brought together in some sort of single accommodation. But was it intended that one system would dominate at the expense of the other? Or was mutual survival expected or even guaranteed? Part of the answer to that question is in the age old debate between the English language text and its focus on the transfer of sovereignty in exchange for a guarantee of native title, and the Māori language text which transferred law-making power (*kawanatanga*) to the Crown in exchange for the autonomy right expressed as *tino rangatiratanga*.

In the 19th century and for most of the 20th century the law avoided framing this debate as a legal debate by rejecting the Treaty as an instrument having any legal effect. Prendergast CJ in *Wi Parata v Bishop of Wellington* famously described the Treaty as a "simple nullity" at least as an instrument of cession.⁹ Māori lacked sovereign capacity. They possessed none of the usual furniture of government and law, said the Chief Justice, and so could claim none of the advantages of the second law. And in *Te Heuheu Tukino v Aotea District Māori Land Board*, 64 years later, the Privy Council, while implicitly at least rejecting that nullity thesis, nonetheless considered that an international Treaty had no direct enforceability at domestic law.¹⁰ The Treaty of Waitangi then was New Zealand's *terra nullius*, roundly rejected as a source of rights within the second law.

C. Native Title and Enforceable Custom in the Second Law

Two further tracks need to be followed up. The Treaty is not the original source either of the native title explicitly referred to in the English text of Article 2 or of the custom law implicitly referred to in the Māori text of Article 2. The Treaty merely affirms their prior existence and the Crown's promise (whether enforceable or not) to respect them. In that sense it performed the same function as George III's Royal Proclamation of 1763 did in respect of native title east of the Appalachians after the Anglo-French seven years' war.

Both Paul McHugh¹¹ and Mark Hickford¹² have written leading texts on the nature and enforceability of native title across the British Empire jurisdictions, but with a focus on the situation in New Zealand. McHugh no longer propounds his groundbreaking theories of universal continuity of legal recognition of native title, accepting instead that there was wide diversity in the manner and extent of recognition across the British Empire and great debate among the judges. Hickford

9 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 at 78.

10 *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308, [1941] NZLR 590 (PC).

11 PG McHugh *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, Oxford, 2011).

12 Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011).

emphasises the untidiness and idiosyncrasies of native title recognition in different jurisdictions. By his analysis the failure of the respective colonial legal systems in British Columbia and Australia to recognise native title are examples of this untidiness, rather than exceptions to a grand rule of continuity.

In New Zealand the question of the common law enforceability of native title and custom was easily avoided in the 19th and early 20th centuries by the legislative and title extinguishing activity of the Crown. Crown land purchasing between 1840 and 1860 – in reliance on the Crown pre-emption clause in Article 2 of the Treaty – was followed by the Native Lands Acts of 1862 and 1865. These Acts repealed the Crown's purchase monopoly, individualised Māori land entitlements and created a title allocation court. Pre-1860 Crown land purchasing had opened up the South Island and lower third of the North Island, while in the 30 years following 1865 the Native Lands Acts opened up the upper two-thirds of the North Island. The last hold-outs were the King Country and the Urewera.

Whatever its status at common law, native title was certainly recognised in Crown policy from the very beginning and in Parliamentary legislation from 1862. Such recognition as was provided had one purpose: the cheap extinguishment of said title to make way for colonisation as quickly as possible. Once the Native Land Court was in place, fights between the Crown and Māori over land were played out by petition to the Native Affairs Select Committee rather than on the battle field, and they were almost exclusively about Native Land Court awards in relation to particular blocks of land and/or the manner of extinguishment of such titles. They were detailed and messy affairs but they took the concept of native title itself as a given.

The first law of Aotearoa was made relevant in the title allocation process. Titles were to be allocated to such right-holders as Māori custom dictated. It could hardly have been otherwise. But that relevance was transitional. It was to prepare the land either for alienation into settler hands (most often via Crown purchase even after the Crown's general monopoly was abandoned), or by transforming the reserves that remained in Māori hands to estates cognisable at English law called native freehold title. Common law native title only occasionally reared its head and then only around the edges of the legislative regime in relation to resources not specifically recognised in statute: in the Rotorua and Taupō lakes – *Tamihana Korokai v Solicitor-General*;¹³ in the foreshore – *Re The Ninety-Mile Beach*;¹⁴ and in river beds – *Re The Bed of the Wanganui River*.¹⁵

Like the legislators, the judges were positivist by inclination. Their opinions tended to turn on whether the provisions of the Native Land legislation were wide enough to encompass the resource in question. *Re The Ninety-Mile Beach* concluded that a grant of native title by the Native Land Court in respect of land above mean high water mark impliedly extinguished any connected title to the adjoining foreshore below mean high water mark. *Tamihana Korokai* on the other hand concluded that an application to the Native Land Court for title to the Rotorua lakes could be entertained by that Court and such title as might be found to exist under its legislation could not be extinguished by mere declaration of the Solicitor-General.

The *Wanganui River Bed* case found, somewhat consistently with the *Ninety-Mile Beach* case, that the *ad medium filum* rule applied to the beds of New Zealand rivers, though erroneously as a matter of Māori custom rather than English legal presumption. These cases seemed to proceed on

13 *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA).

14 *Re The Ninety-Mile Beach* [1963] NZLR 461 (CA).

15 *Re The Bed of the Wanganui River* [1962] NZLR 600 (CA).

the positivist basis that native title was only recognisable because a statute said it was, and that such title was not enforceable by suit in the general courts in accordance with any principle of the general law.

As Prendergast CJ opined in *Wi Parata*, claims to native title are not justiciable in the ordinary courts and the Crown must “acquit itself as best it may” as the “sole arbiter of its own justice”.¹⁶

D. Custom

What then of the enforceability of free-standing custom?

Just as there was an unassailable argument – in the end accepted by the settlers – that every inch of land in Aotearoa was owned by some hapu prior to colonisation, it is as I have tried to demonstrate, unquestionably the case that Māori society was organised in accordance with enforceable customary legal norms prior to the arrival of the English common law. These are the norms that are encapsulated in the concept of tino rangatiratanga (self-determination in modern English) retained to Māori by Article 2 of the Treaty. Although some academics prefer to argue that Māori custom is an incident of the concept of taonga provided for in the same article, I for myself doubt whether that is conceptually sound. Rather, it is better to think of customary law as a necessary and inevitable expression of self-determination.

But did those customs, or tikanga as I earlier described them, survive the impact of post-Treaty colonisation? Dr Robert Joseph reminds us, in his comprehensive treatise *Re-Creating Legal Space for the First Law of Aotearoa – New Zealand*, that a number of early statutes had, by necessity, to recognise and apply tikanga.¹⁷ There was the Native Exemption Ordinance of 1844 excluding Māori on Māori crime from the reach of English criminal law and applying muru-like penalties in inter-racial theft cases.¹⁸ Imprisonment was rejected early on as a general sanction because Māori viewed jail as abhorrent.¹⁹ Governor Grey’s Resident Magistrates Courts Ordinance of 1846 is another hybridised example in which a white Magistrate sat as a panel with two native assessors (always chiefs). The coram was required to reach a unanimous verdict. This meant, inevitably, that custom would come to play a significant role even in the assimilating mechanisms conceived by the Governor.

There was also s 71 of the New Zealand Constitution Act 1852 which allowed the Governor to set aside districts in which Māori custom would be the applicable law. The section was never used. That fact itself is an indication of settler attitudes to separate Māori self-determination despite the terms of the Treaty. But there is no doubt that right through the 19th and early 20th centuries there were districts that, with or without settler approval, lived by tikanga Māori as the applicable law.

By 1877 and the *Wi Parata* case, Prendergast CJ felt able to say that no body of custom law existed and not even the Native Land Act 1873 with its specific reference to such custom as the metric for title awards, could call into existence an illusion. That finding was roundly rejected by the Privy Council in *Nireaha Tamaki* but somehow Prendergast CJ’s prejudices persisted in New Zealand legal culture throughout the second law.²⁰

¹⁶ *Wi Parata v Bishop of Wellington*, above n 9, at 78.

¹⁷ Robert Joseph “Re-Creating Legal Space for the First Law of Aotearoa – New Zealand” (2009) 17 Wai L Rev 74.

¹⁸ At 77.

¹⁹ Joseph, above n 17.

²⁰ *Nireaha Tamaki v Baker* [1901] AC 561, (1901) NZPCC 371.

In fact as *Salmond on Jurisprudence* notes, the common law itself was originally custom:²¹

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

Both *The Case of Tanistry*²² in 1608 and *Campbell v Hall*²³ in 1774 recognise that local custom can (subject to the repugnancy test) survive the arrival of the English common law. The tests sourced from those authorities are applied in fact in the recent Court of Appeal decision in *Takamore* about which I will say more below.

But in second law New Zealand, examples of recognition were intended to be points along a journey to jurisdictional amalgamation, rather than dots to be joined to demonstrate continuity of recognition of ongoing custom to the present day. In different ways and from very different perspectives, Mark Hickford²⁴ and Professor John Dawson²⁵ argue that the most significant obstacle to the recognition of a thorough going and independent sphere of custom law was the large scale extinction of native title in the second half of the 19th century. Custom was, they argued, inextricably linked with the retention of a territory over which a holistic system of law could operate. That is why custom law has not been the political or judicial focus in New Zealand that it has been in the United States where tribes are seen as exercising originating sovereign powers on reservation land.

Nonetheless, custom issues continued to arise with regularity in New Zealand jurisprudence throughout the late 19th and early 20th centuries, usually in the limited recognition environment of the Native Lands Acts and most often in the context of succession to Māori land.²⁶ Custom had become confined as a subject and, within its confinement, atomised into controversies over rights to individual interests in Māori land. The stage seemed set for the complete extinguishment of Māori title to the assets that gave Māori custom continuing relevance, and therefore the extinguishment of Māori custom itself as a jural phenomenon in New Zealand.

E. Summary

In summary, the second law at its positivist height rejected the legal relevance of the Treaty, reduced native title to its statutory boxes and acknowledged tikanga Māori only as a temporary expedient in the wider project of title extinction and cultural assimilation. The future for a distinct Māori cultural and legal existence in these islands looked bleak indeed.

21 P Fitzgerald *Salmond on Jurisprudence* (12th ed, Sweet and Maxwell, London, 1966) at 189–190 cited in Joseph, above n 17, at 86.

22 *The Case of Tanistry* (1608) Davies 28 (KB).

23 *Campbell v Hall* (1774) 1 Cowp 204 (KB).

24 Hickford, above n 12.

25 John Dawson “The Resistance of the New Zealand Legal System to Recognition of Māori Customary Law” (2008) 12 *Journal of South Pacific Law* 56.

26 These were no longer questions of free-standing surviving custom, but rather incorporated custom, the application of which was made necessary by explicit statutory discretions.

III. THE THIRD LAW OF AOTEAROA/NEW ZEALAND

The enormous changes wrought by the arrival of the second law in the 19th century occurred in the context of unprecedented immigration and the equally unprecedented extinction of native title. This was achieved through Crown purchase prior to 1860, through war and confiscation, and through that “engine of destruction” called the Native Land Court after 1865. It is that revolutionary change, achieved valley by valley over two generations, that reduced the first law to a bare shadow of its former self. By World War II, little Māori land remained and tikanga Māori lived on only in villages, homes and marae on that remnant land base, beyond the reach of judicial, legislative or executive oversight. But that, as we know, was not the end of the story.

Though much weakened, the first law nonetheless survived into a discrete third phase after the momentum of amalgamation, assimilation and extinction in the second law abated and New Zealand was forced by circumstance into a reluctant search for itself. This is the period from the 1970s on, with which we are more familiar. It is the period during which some of the surviving remnants of Māori custom were, in one form or another, incorporated into legislation in key spheres of New Zealand life. This phase begins with the enactment of the Treaty of Waitangi Act 1975 and the creation of the Waitangi Tribunal, first with prospective jurisdiction only and then, in 1985, with retrospective jurisdiction to address Treaty breaches in the 19th century – the real grievances of modern iwi.

The introduction of this new mechanism to address both modern and historic Treaty grievances was a legislative response to significant social change in the country. Not just the local effect of race consciousness triggered by the American civil rights movement or sporting ties with apartheid South Africa. Nor even the steady dimming of the Empire’s light as the United Kingdom shifted focus to surviving as a part of Europe. It was, just as importantly, the rise of the Māori demographic and of young urban Māori protest in the 1970s and 1980s. This was the impact of the Māori baby boomers. These factors ultimately led to the construction of the Treaty settlement process in the 1990s, a process that continues at a steady pace today often led on both the Crown and Māori sides by those Māori baby boomers.

But the impact of these underlying social and political changes on New Zealand law and policy was much wider still. In the 1980s after the Waitangi Tribunal first began to prod them forward, judges rediscovered the old common law doctrine of aboriginal title. As a result, both legislature and judges rediscovered the Treaty of Waitangi. From there followed pioneering legislative changes in environmental and family law in the 1980s and 1990s, together with changes in conservation law. And in more subtle ways, the list began to grow: the law relating to trusts and Māori land administration, charities and tribes, intellectual property and cultural rights, the law relating to protected areas and objects, employment law and dispute resolution, sentencing and the place of ethnicity, and so on. All came to address in their respective silos the ways in which the values of the first law might have continuing impact in this new post-Empire phase of our national and legal development.

In one important way this third law phase was very similar to the colonial second law phase. That is in the sense that Māori custom was recognised in law and legal process primarily through legislation rather than common law. Not entirely, but primarily. This, as Boast and Dawson have said, reflects both our constitutional structure and our constitutional culture. Power in New Zealand is centralised to a high degree in a Cabinet that both controls and answers to a sovereign, unicameral legislature. Māori issues have always been mediated in New Zealand by passing an Act first and

asking questions later. They still are. It would be easy then to conclude that the modern phase is a simple continuation of the second law with a few mitigatory post-colonial add-ons.

But that would be wrong. I think that there is a key distinction between law in the colonial period and that of the post-1970s modern period. It is this: where tikanga Māori was recognised during the colonial period, it was recognised only to the extent necessary to succeed in extinguishing it. The Crown recognised native title in the period prior to the Native Land Court only so that it could purchase it on highly advantageous terms or take it as the spoils of war. The Government recognised native title through the Native Land Court only for the purpose of facilitating the destruction of customary tenure and the alienation of the new individualised land interests. The criminal law ordinances of 1840 and the Resident Magistrates system of 1846 were seen as temporarily necessary to smooth the path to assimilation; all were brief stopovers on a linear path to extinction.

The recognition of custom in the modern era is different. It is intended to be permanent and, admittedly within the broad confines of the status quo, transformative.

For that reason, I consider that this modern period represents a third law, different both from the first law of Aotearoa and the second law of New Zealand, the latter so intent on destruction of its predecessor. This third law is predicated on perpetuating the first law, and in so perpetuating, it has come to change both the nature and culture of the second law. And it is at least arguable therefore that the resulting hybrid ought to be seen as a thing distinct from its parents with its own new logic. I do not have time to trace every subcategory of law in which a Māori dimension can be found, but it is worth tracking the big ones. They provide excellent examples of the tensions in this new fused system: the push/pull of what is after all a very human process of law-making and nation-building – or perhaps law-making *as* nation-building.

IV. THE BIG THREE

I will begin with picking up the threads of the big three: the Treaty, native title and standalone Māori custom before moving to categories that belong more squarely to New Zealand's natural positivist preferences – environment, family, crime and so on.

A. *The Treaty*

By the period of the modern Treaty settlement process circa 1990, the status of the Treaty was, as Matthew Palmer rightly points out, a matter of real legal debate.²⁷ Pointing to the infusion of Treaty principles into the workings of executive government via the Cabinet Manual, Palmer cautions that the question of the Treaty's fuzzy legal status should not be confused with its significant practical effect in the workings of government.

Wholesale statutory inclusion of Treaty principles as mandatory relevant considerations in key areas of state activity such as environmental regulation, conservation, the sale of state assets, and

²⁷ Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

of course the Treaty of Waitangi Act itself made the question of the Treaty's standalone legal status less pressing in practical terms. Cooke P in the famous 1987 *Lands* case, tantalisingly described *Te Heuheu* as the law on the status of the Treaty "at any rate from a 1941 standpoint".²⁸

At around the same time, judges were prepared to explore the gaps in statutory language in their search for a credible Treaty of Waitangi after Empire. Thus in 1987 Chilwell J was persuaded to read the Treaty of Waitangi into a provision of the Water and Soil Conservation Act 1967 that contained no reference to the Treaty or indeed Māori considerations of any kind. The Treaty was, he said, a part of the "fabric" of New Zealand society, and ought not to be ignored.²⁹

Gallen and Goddard JJ in *Barton-Prescott v Director-General of Social Welfare* found that "all Acts dealing with the status, future and control of children, are to be interpreted as coloured by the principles of the Treaty of Waitangi", whether or not the Treaty was the subject of express statutory reference.³⁰ Child welfare, the Court held, is a core Treaty issue and the Treaty's terms speak to it.

In the same year as *Barton-Prescott* the High Court also confronted the issue of Māori customary fishing rights under the Fisheries Act 1983 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.³¹ McGechan J considered that even in the absence of an express statutory obligation to apply the principles of the Treaty, a minister's exercise of discretion must be coloured by the Treaty background of the thing being considered.³² He analogised:³³

[I]f the Minister has discretionary power to expend a fund in preservation of works of art, and there is not enough to go around, and some are taonga which under Article II the Crown has Treaty obligations to protect, then even if there is no express statutory discretion to apply principles to the Treaty, it would hardly be open to the Minister totally to ignore that Treaty background and that character as a taonga.

As Palmer rightly warns, it is important not to get carried away in assessing the impact of these authorities, but they are nonetheless significant markers of the (then new found) place of the Treaty in public law.³⁴

These matters were left until 2007 and that year's iteration of the *New Zealand Māori Council v Attorney-General*, this one a case involving an attack on a settlement relating to Crown forestry land.³⁵ The Māori Council argued that the settlement would breach an earlier agreement between the Council and the Crown. Although the issue did not require resolution, the Court of Appeal expressed a view on the question of the Treaty's direct enforceability at law.

The Treaty, the Court said, could have direct impact in judicial review cases (the Treaty being an implied or express relevant consideration), or in cases involving statutory interpretation (by reading the statute so as to be consistent with Treaty obligations). But it could not, on its own, form

28 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands* case] at 667.

29 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 196.

30 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184.

31 *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries HC Wellington CP237/95*, 24 April 1997.

32 At 148.

33 At 148.

34 Palmer, above n 27.

35 *New Zealand Māori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318.

the basis of an action in the New Zealand courts. In this the Court considered it was following principles laid down in the *Lands* case.³⁶

The appeal that followed to the Supreme Court was subsequently withdrawn but only after the Supreme Court issued a minute recording that the parties themselves acknowledged the Court of Appeal's comment on Treaty status, and those in relation to Crown fiduciary obligations,³⁷ were obiter dicta. It thus cannot yet be said with confidence that O'Regan J's (as he then was) assessment of the modern status of the Treaty is the last word on the matter.

Matthew Palmer's modest proposal was that the Treaty should be given general legal effect through the enactment of an ordinary statute along the lines of the New Zealand Bill of Rights Act 1990. That proposal has not yet been taken up, and was ultimately rejected by the 2013 constitutional advisory panel.³⁸ So the ball is accordingly back in the judges' court (excuse the pun).

B. Native Title

The five-judge Court of Appeal decision in *Ngati Apa v Attorney-General* is New Zealand's modern landmark authority on native title.³⁹ Faced with contradictory authority from the second law phase, the Court opted for the continuity of recognition theory of native title. The Court was prepared to join the dots between the run of New Zealand cases that accepted that colonisation delivered a radical title to the Crown (imperium) but retained a form of usufructory title in Māori as a burden on the Crown's radical title (dominium). *Wi Parata v The Bishop of Wellington*⁴⁰ and *Re The Ninety-Mile Beach*⁴¹ were treated by the Court as "discredited" and "wrong", even in their own time, and *R v Symonds*,⁴² *Manu Kapua v Para Haimona*⁴³ and *Nireaha Tamaki v Baker*⁴⁴ were seen as affirming an imperial continuity doctrine.⁴⁵ Resort was also had to supportive 19th century authorities from cognate jurisdictions – *Johnson v M'Intosh*⁴⁶ and the Cherokee cases in the US Supreme Court⁴⁷ and *St Catherine's Milling and Lumber Co v The Queen*⁴⁸ in the Privy Council

36 As to relevant considerations, the Court cited *Huakina* and in relation to statutory interpretation the case cited was *Barton-Prescott*.

37 Throughout the 19th century, the colonial Crown in New Zealand did in fact create statutory trustees and statutory protections around the process of land sales – the appointment in the 1840s of the Office of the Protector of Aborigines is an example, as were the extensive safeguards drafted into the Native Land legislation after 1867. These didn't work, and there is much Waitangi Tribunal litigation around why (see for example the Tribunal's 2004 report on the Gisborne claims – *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004)). But for present purposes, the important point is the Crown saw that it had at least a political obligation to provide such protection.

38 Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (November 2013) at 33–34.

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

40 *Wi Parata v The Bishop of Wellington*, above n 9.

41 *Re The Ninety-Mile Beach*, above n 14.

42 *R v Symonds* (1847) NZPCC 387 (SC) at 390.

43 *Manu Kapua v Para Himona* [1913] AC 761 (PC) at 765.

44 *Nireaha Tamaki v Baker* [1901] AC 561 (PC).

45 *Ngati Apa v Attorney-General*, above n 39, at [13].

46 *Johnson v McIntosh* 21 US 543 (1823).

47 *Cherokee Nation v Georgia* 30 US 1 (1831); *Worcester v Georgia* 31 US 515 (1832).

48 *St Catherine's Milling and Lumber Co v R* [1888] 14 AC 46 (PC).

on appeal from Canada.⁴⁹ The Court also reached across jurisdictions in the modern era. The Judges cited the Australian authority in *Mabo*⁵⁰ and the Canadian authorities in *Delgamuukw*⁵¹ and *Sparrow*⁵² to show that the doctrine of native title in its modern form had universal application across the Empire now too.⁵³ *Ngati Apa* was rightly seen by specialists and academics as entirely orthodox late 20th century, anglo-common law indigenous rights law.

Predictably, given our consistent legal history in this regard, the New Zealand legislature responded quickly by introducing the Foreshore and Seabed Act 2004.

C. *Tikanga Māori*

The issue of whether a free-standing form of Māori custom law, unconnected to a native title-based resource claim, could be directly enforced in New Zealand did not arise in the modern era until the case of *Takamore v Clarke*.⁵⁴ This is perhaps a reflection of the multiple categories of modern New Zealand law into which Māori custom is incorporated in some form, and the extent to which legislation has generally displaced the common law. At issue was whether Māori custom controlled where a Māori deceased should be buried, or whether the executor under the will (his Pākehā spouse) had the final say. The latter, it was contended, followed the common law rule, although there was considerable debate about whether that was the common law rule at all.

In the Court of Appeal, Glazebrook J (writing for herself and Wild J) adopted an orthodox incorporation analysis. She concluded that there was such a thing as Māori burial custom and it had been followed continuously from time immemorial until the present day. But, she said, to the extent that this custom sanctioned the forcible taking of a deceased from his or her family, the custom was unreasonable and therefore should be considered unenforceable in its entirety. The right of control therefore defaulted to the executor.

The Supreme Court on appeal adopted quite a different and, I suggest, novel approach. All five Judges assumed as an abstract proposition that Māori custom was indeed a part of the New Zealand common law in some form. All implicitly rejected the notion that Māori burial custom was unreasonable as a general proposition and therefore could not be enforced as a part of the law of New Zealand.

The principle espoused by the Chief Justice (and followed by William Young J in a separate opinion) was essentially that the venerable tradition of the common law is that it morphs and adapts to the circumstances and location in which it operates and that means local indigenous custom will usually have some kind of transformative effect on the arriving system. Just what kind of effect is not articulated – that will fall to be resolved by the courts on a case by case basis.

The Chief Justice took a direct route. She said:⁵⁵

Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality

49 *Ngati Apa v Attorney-General*, above n 39, at [19], [20] and [142].

50 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HCA) at 50.

51 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

52 *R v Sparrow* [1990] 1 SCR 1075 at 1099.

53 *Ngati Apa v Attorney-General*, above n 39, at [31] and [148].

54 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573.

55 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]–[95].

in the particular case. That accords with the basis on which the common law was introduced into New Zealand only “so far as applicable to the circumstances of the ... colony”. ... Māori custom according to tikanga is therefore part of the values of the New Zealand common law ...

[A]s in all cases where custom or values are invoked, the law cannot give effect to custom or values which are contrary to statute or to fundamental principles and policies of the law.

The majority judgment of McGrath J (writing also for Tipping and Blanchard JJ) concluded that the common law was clear that the matter was controlled by the executor. But in a more dilute recognition of custom, McGrath J nonetheless accepted that Māori custom will be a relevant consideration for the executor (apparently relevant in a quasi-public law sense), along with any other relevant circumstances, when the executor comes to make his or her decision. He said:⁵⁶

The common law is not displaced when the deceased is of Māori descent and the whanau invokes the tikanga concerning customary burial practices, as has happened in this case. Rather, the common law of New Zealand requires reference to the tikanga, along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation.

So tikanga is no longer seen as an independent source of law but rather as a flavour in the common law of stronger or weaker effect, depending on subject matter and context.

This is an interesting new take on the survival of custom in modern law. It is consistent with *Tanistry* and *Campbell v Hall* in the sense that it reflects the original conception of the common law as itself custom. It therefore logically contemplates the incorporation of custom from sources outside the common law into the common law. But it does this in a peculiarly public law way. Custom is a relevant consideration for the individual with the power of decision where context and subject matter require it. This approach is, in substance, indistinguishable from that in *Huakina* and *Barton-Prescott*. Are the once separate approaches of the courts to the Treaty, Māori custom and Māori interests generally beginning to merge?

D. A Brief Summary: The Treaty, Native Title and Custom

It has been necessary to pick up the key strands of legal contestation arising at the point of formal contact (or collision) between the first law and the newly arriving second law and bring those strands through to the present. There was the Treaty and its content and its status. The nature and status of native title, and the legal enforceability of Māori custom once the second law arrived. I said that the Treaty, a solemn compact in 1840, came to be regarded in law as unenforceable unless the settler legislature had incorporated it, though it was, in the modern period, resurrected in much weaker form as subtly relevant in judicial review and statutory interpretation exercises. Background to the 2007 *New Zealand Māori Council* case makes it clear that we do not yet have the last word on this subject.

The enforceability of native title was contestable through the 19th century, but by the end of the 20th century, the New Zealand courts, like those in Australia and Canada, had adopted a doctrine of continuity of recognition even if the title itself was highly defeasible.

Finally custom, the subject of a reasonably clear guarantee in the Treaty and given practical recognition in statutory instruments from the very beginning, progressively faded from view as the

⁵⁶ At [164].

19th century played out, and native title was progressively extinguished on the ground. Its primary life in state law during those years was in fact within the discipline of allocating ownership by custom in the transformative Native Land Court. By the early 21st century, the whole role of Māori custom in New Zealand society had become reinterpreted as relevant but again highly contestable, even in particularly Māori spheres of activity like burial custom.

In short, the big three have survived the second law phase. Each is in a fragile state as it attempts, with some success, to shake off the effects of that phase. It cannot yet be predicted whether the third law phase will see their status enhanced, but it must be said there is no particular reason to be pessimistic at this stage. Indeed a survey of Māori law in the legislative context might well suggest there is a basis for cautious optimism. I turn now to that context.

V. MĀORI LAW IN LEGISLATION – THE FIRST MOVERS

The first three areas of significant legislative change were in historical Treaty claims, environmental regulation and family law. These were the big categories because they were, and remain, the subject of intense focus within the Māori community. Relatively significant change was made in these areas from the mid-1980s through to the early 1990s. Historical Treaty claims law and policy is a temporary phenomenon. The Government's aim is to complete the process of compensating the descendants of those who suffered during the colonial period and then to put that chapter in our history behind us. Its biggest long-term impact will be in bringing the 50 or 60 settling tribes into the penumbra of the law, for the most part, for the first time. They will unquestionably change the law by dint of entering its sphere. I will come back to that issue below. My focus at this point will be on the other two areas. I want to trace, at a very high level, developments in environmental and family law as a useful starting point in explaining how legislation has helped create the third law phase.

A. Environment

Step-changes in environmental regulation were first triggered by case law. The old s 3(1)(g) of the Town and Country Planning Act 1977, the predecessor of s 6(e) of the current Resource Management Act 1991, made the Māori relationship with their ancestral land, a matter of national significance in town and country planning. But its reach had been restricted to Māori-owned land until the 1987 High Court decision in *Habgood*.⁵⁷ *Habgood* found that *any* land the subject of Māori ancestral connection was addressed by the provision.⁵⁸ This made Māori ancestral connection to land relevant everywhere in land use planning. That changed the game in an obviously important way.

I have already mentioned *Huakina*'s general impact on Treaty law, but it had an important specific impact on environmental law. Moving from land use to water use, *Huakina* (also, coincidentally, in 1987) imported the Treaty of Waitangi into the Water and Soil Conservation Act 1967 when the statute was entirely silent on the question.⁵⁹ Using orthodox judicial review principles it made Māori interests in, and ancestral connections to, water a relevant matter in the

⁵⁷ *Royal Forest and Bird Protection Society Inc v WA Habgood Ltd* (1987) 12 NZTPA 76 (HC).

⁵⁸ At 9.

⁵⁹ *Huakina Development Trust v Waikato Valley Authority*, above n 29.

allocation of all water rights. The reasoning was orthodox, but it was deployed because something quite fundamental had changed in judicial attitude to the subject matter.

As I hinted earlier in the context of native title and the Treaty, it is important to understand that these cases were not decided in a jurisprudential vacuum. They were issued at the same time as similar aboriginal rights cases. There was the 1986 High Court decision in *Te Weehi v Regional Fisheries Officer*, the first of the modern authorities to recognise an aboriginal right in fishing.⁶⁰ And of course in the same year was the *Lands* case made possible by s 9 of the State-Owned Enterprises Act 1986. The cases were in turn being driven by Māori litigation and other activism, and the writings of young scholars such as Paul McHugh, the son of a respected Māori Land Court Judge. McHugh had studied at the Native Law Centre at the University of Saskatchewan where he was reminded that native title was a common law doctrine not a statutory creation.

These developments in the native rights and statutory rights area were mutually affirming and strengthening. There was, in a sense, a grand conversation going on here, between three players: iwi, the courts and the legislature with the academy taking cameo roles at important junctures. The conversation lasted for a decade.

Outside the Treaty settlement process, which took much longer to construct in its present form, the Resource Management Act 1991 model was the most important and impressive result of this grand conversation. It led to the inclusion of multi-dimensional Māori provisions in pt 2 of that Act: s 6(e) picked up the old s 3(1)(g) of the Town and Country Planning Act 1977, and relying on *Habgood and Huakina*, applied it (effectively) to all natural resources; s 7(a) of the Resource Management Act 1991 (RMA) introduced the tikanga value of kaitiakitanga into environmental management;⁶¹ and s 8 imported the principles of the Treaty.⁶² It was the first genuine attempt to import tikanga in a holistic way into any category of the general law.⁶³

Not much was left out. Mechanisms were provided to ensure the Māori voice could participate as an initiator, and not just as an objector: s 33 related to delegations of final decision-making power, heritage protection provisions could apply to iwi and hapu, and iwi-generated planning documents were made relevant in the planning process for the first time. Māori communities could make their vision for their traditional territories relevant to the process.

But these Māori interest-based considerations still had to compete for the attention of the final decision-maker against a multi-layered menu of other interests. Ancestral relationships, kaitiakitanga and the Treaty were all relevant, each differently weighted in the statute, but ultimately easily set to one side if necessary in pursuit of a western empirical or scientific view of sustainable management if that was the preference of the relevant decider.

The courts, local authorities, resource users and the Māori community have had more than two decades of experience with this integrated recognition of Māori custom in the regulation of the

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

61 *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA). The signal and a single-handed achievement, in my view, of Dame Nganeko Minhinnick's campaign to protect the Waikato River and the Manukau harbour from degradation through unsustainable use.

62 Section 8 of the Resource Management Act 1991 followed *Huakina* but it must be remembered that these changes also occurred at the time that Treaty clauses were routinely included in statutes governing areas of particular Māori focus: I have mentioned s 9 of the State-Owned Enterprises Act 1986, but there was also the long title to the Environment Act 1986, s 4 of the Conservation Act 1987 and so on. These reflected, for their time, quite significant changes in legal mind set and culture.

63 Codifying *Habgood* and *Huakina*.

environment. I want to spend a little time gauging where this particular model has taken law at the interface between the Māori and wider New Zealand communities. This is necessary and, I suggest, useful, because of all such cultural interface management mechanisms, the model adopted in the RMA is the most sophisticated.

Four cases show how the Environment Court and appellate courts have struggled with the different culture and custom law of the Māori community in environmental regulation over this period.

A starting point for brief mention is *Watercare Services Ltd v Minhinnick* in which the courts set the statutory test for offensiveness under s 314 of the RMA.⁶⁴ The appellant argued that the construction of a sewer pipe through an archaeological site Mrs Minhinnick claimed to be a wahi tapu was culturally offensive. The Environment Court decided that the applicable standard in determining whether the proposal was indeed offensive was that of a reasonable (implicitly non-Māori) member of the wider community. In the High Court, Salmon J, formerly a leading planning silk, found that this was wrong and that offensiveness could only be measured from the perspective of a reasonable member of the Māori community. The Court of Appeal, rather surprisingly, reversed the High Court, preferring the approach taken by the Environment Court. Thus it seems that actions objectively offensive to Māori (if found to be so) would only breach the standard in s 314 if the majority non-Māori community agreed. The Court seemed to fear that a Māori-centric standard could cause the majority to be held in thrall to minority sensibilities. This is a common theme in the discretionary application of Māori custom to cross-cultural circumstances.

The decision of the Environment Court in *Ngati Rangī Trust v Manawatu-Wanganui Regional Council* is, with respect, an example of the Environment Court really grappling with, and trying to make sense of, the traditional Māori relationship with natural resources, in that case between the Whanganui River tribes and the river itself.⁶⁵ The case concerned consenting of the Tongariro Power Development and the (wrongful in Māori eyes) diversion of water out of the Whanganui and Whangaehu river catchments and across the island into the Taupo Tongariro catchment.

The Court heard evidence in Māori communities and was clearly struck by the depth of Māori feeling and the different way in which Māori perceived their relationship to the resource.

As the Court described it:⁶⁶

The most damaging effect of both diversions on Māori has been on the wairua or spirituality of the people. Several of the witnesses talked about the people “grieving” for the rivers. One needs to understand the culture of the Whanganui River iwi to realise how deeply engrained the saying *ko au te awa, ko te awa, ko au* is to those who have connections to the river. The iwi see the river as a part of themselves, and themselves as part of the river. Their spirituality is their “connectedness” to the river. To take away part of the river (like the water or river shingle) is to take away part of the iwi. To desecrate the water is to desecrate the iwi. To pollute the water is to pollute the people.

It appeared that the Whanganui River tribes called limited scientific evidence while Genesis Energy’s scientific evidence was extensive. The Court found that there was a disconnect between the two perspectives and that further discussion and consultation was required to find common ground. The Court judged that a limited water right (10 years) should be granted to Genesis rather

⁶⁴ *Watercare Services Ltd v Minhinnick*, above n 61.

⁶⁵ *Ngati Rangī Trust v Manawatu-Wanganui Regional Council* NZEnvC Auckland A067/2004, 18 May 2004.

⁶⁶ At [318].

than the full term (35 years) requested. This was in order to allow the two worlds to begin a conversation over accommodation and mitigation.

The High Court⁶⁷ and a majority in the Court of Appeal⁶⁸ found that the Environment Court had erred in the approach it took. William Young P considered that the Court was just giving the iwi another chance to produce a better case in 10 years' time. A consent that involved more time for a longer conversation about mitigation of effects was not permissible. The Environment Court had to make a decision. The High Court had made much of the refusal of the Whanganui tribes to engage in any consultations with Genesis – a refusal the Environment Court accepted as understandable in light of the iwi's deep suspicion of Genesis' intentions. The majority in the Court of Appeal implicitly affirmed the High Court's criticism of the iwi.

The result is disappointing in terms of the Act's overall effectiveness in mediating Māori concerns that impact on the wider community and economy. If the reforms contained in the RMA were about anything, they were about providing a platform upon which the two systems could engage in civilised conversation about their differences and mutual interests. Given Whanganui's hundred year history of claims in respect of the river and their opposition to the power development since its inception, their anger at and distrust of Genesis was, with respect, understandable.

Make no mistake, the decisions in the High Court and Court of Appeal were orthodox on the law, but in practical terms the *Genesis Energy* case probably represents a missed opportunity to adapt and mould RMA processes in a new and innovative way. As Ellen France J noted in dissent, an adjournment for further discussion between the parties over acceptable mitigation measures would probably have been unobjectionable and would have achieved the same result.

I am told that despite the result on appeal, the parties did meet and discuss appropriate accommodations and common ground was eventually found as the Environment Court had hoped.

As it turns out, the Whanganui tribes are now in negotiations with the Crown over the settlement of the Whanganui River claim. And although a final settlement is not yet signed, it is clear that Māori and the Crown are of one mind that the river should be recognised as having its own legal personality and its own independent interests deserving of protection. This is likely to change any further reconstituting processes in fundamental ways.

The *Friends and Community of Ngawha Inc* case related to the building of Ngawha Prison on land said by some of the hapu of the area to be the domain of a taniwha named Takauere.⁶⁹ They argued in the Environment Court, High Court and Court of Appeal that the taniwha would be adversely affected. The Māori position in the Environment Court was divided. Some members of the hapu believed this to be so; others rejected that allegation and sided with the applicant. Each of the courts, in dismissing the appeal, struggled with the whole idea of whether and how secular courts should make provision for spiritual beliefs and cultural entities such as those at issue in this case.

Perhaps understandably given their own cultural backgrounds, judges brought a degree of scepticism to the task of weighing spiritual concerns in relation to taniwha against wider tangible environmental effects. The Environment Court found that disputes within the community over taniwha were simply not justiciable, a view with which Wild J in the High Court implicitly

67 *Genesis Power Ltd v Manawatu-Wanganui Regional Council* (2006) 12 ELRNZ 241, [2006] NZRMA 536 (HC).

68 *Ngati Rangi Trust v Genesis Power Ltd* [2009] NZCA 222.

69 *Friends and Community of Ngawha Inc v Minister of Corrections* (2002) 9 ELRNZ 67, [2003] NZRMA 272 (CA).

concurrent.⁷⁰ But all Judges accepted that s 6(e) of the RMA requires the court to take into account metaphysical and intangible matters and therefore to take into account Māori belief in the existence of the taniwha and the allegation of effects on it.

In the end, the Environment Court found as a matter of fact that the prison development did not affect the taniwha or belief in it, relying on evidence from within the community to reach that conclusion. The appellate courts concluded that these findings of fact meant that no relevant question of law arose. The problem was thus neatly avoided. But after two decades of jurisprudence in these matters the courts can still, with respect, demonstrate relatively limited understanding of the techniques Māori custom would use to assess the veracity of conflicting evidence on spiritual matters, still less of the metrics from within Māori custom by which effects on spiritual interests might be properly and objectively measured.

The Environment Court decision in *Ngati Hokopu* is an interesting exception.⁷¹ The Court took a post-modern relativistic approach to this question when it was faced with having to decide whether a proposed development site was a wahi tapu by virtue of being an urupa or burial ground. This case did not bring with it the very difficult metaphysical issues raised in *Genesis* and *Ngawha*. Rather it was a case more easily amenable to western forensic techniques. Were there burials at the consent site or not? Nonetheless, the Court picked up where *Ngawha* left off citing Wild J's difficulty in that case in accepting that beliefs can be regarded as a natural and physical resource, or that they can be sustainably managed as required by the Act.⁷² The Environment Court disagreed with Wild J on the point arguing that the connection between belief and these other matters is to be found in properly understanding the Māori approach to "relationships" as imported into the RMA. There is, the Court said, "no rigid distinction between physical beings, tipuna (ancestors), atua (spirits) and taniwha."⁷³ But, the Court said, in the RMA context:⁷⁴

In our view there can be some meeting of the two worlds. We start with the proposition that the meaning and sense of a Māori value should primarily be given by Māori. We can try to ascertain what a concept is (by seeing how it is used by Māori) and how disputes over its application are resolved according to tikanga Ngati Awa [the relevant iwi in the area]. Thus in the case of an alleged waahi tapu we can accept a Māori definition as to what that is (unless Māori witnesses or records disagree amongst themselves).

After a lengthy and, with respect, rather insightful exegesis on the importance of understanding Māori evidence and beliefs from within that system, the Court then identified appropriate metrics for assessing conflicting evidence from within the Māori "system":⁷⁵

- whether the values correlate with physical features of the world (places, people);
- people's explanations of their values and their traditions;
- whether there is external evidence (e.g. Māori Land Court Minutes) or corroborating information (e.g. waiata, or whakatauki) about the values. By "external" we mean before they became important for a particular issue and (potentially) changed by the value holders;

70 *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC).

71 *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (NZEnvC).

72 At [41].

73 At [42].

74 At [43].

75 At [53] (footnote omitted).

- the internal consistency of people’s explanations (whether there are contradictions);
- the coherence of those values with others;
- how widely the beliefs are expressed and held.

The secret, the Court held, is in making the assessment within the world from whence it came. I agree entirely, with respect.

At least, it must be said, the courts are now genuinely grappling with the issues. And, if *Ngati Hokopu* is a marker of progress, there is some sign that New Zealand judges may in time become comfortable operating within and between the two worlds.

What has changed in environmental regulation over the last 20 years is that Māori issues that were never on the table are now on the table for discussion at council level and in court, even if they must compete for air with a dozen or more other considerations, are highly defeasible and only rarely ever decisive.

The greatest concern is not that judges are struggling to bridge the divide between Māori custom and the more positivist traditions of modern Pākehā law (though that is still a concern). It is rather that, despite the Act’s mechanisms aimed at mediating these issues, it has not over the last two decades produced examples of any significant step change in the *structural* relationships between the necessary players under the Act. Neither s 33 nor the heritage protection provisions in pt 8 have been used by ministers to transfer decision-making powers to iwi or hapu. Partnership-based powers under s 36B have been used by local authorities, as far as I know, only once and then only in relation to Māori-owned land. Iwi generated planning instruments, although they are specifically provided for in the Act, have not enabled iwi and hapu to take the resource management initiative on matters of deep significance to them – that is to drive conversations with local authorities over iwi and hapu priorities. Iwi remain, for the most part, cast in the role of objectors to the initiatives of others. These structural provisions are, for Māori, a dead letter, despite Lord Cooke’s obiter in the *McGuire v Hastings District Council* case that the Māori provisions in pt 2 of the RMA are “strong directions, to be borne in mind at every stage of the planning process.”⁷⁶

The RMA is frankly not pulling its weight. Instead, such modest advances as iwi and hapu are achieving in these structural areas are almost exclusively the result of Treaty settlement negotiations with the central Crown. The new regulatory structure for allocation and use of the resources of Waikato River is the most dramatic example, but there are many others more modest in scale and impact, being introduced settlement by settlement. While these advances are very positive, in my

76 *McGuire v Hastings District Council* [2001] UKPC 43, [2002] 2 NZLR 577 at [21].

view they are a significant admission of failure in the RMA itself, since the mechanisms to achieve similar outcomes have existed in that Act for more than 20 years without being deployed.⁷⁷

B. Family

If environmental law changes were driven from the obvious base that Māori relationships with land, water and environment are the core of Māori culture, then Māori collective relationships – whanau, hapu, and iwi – are a co-equal core of the culture: both of them underpinned by whanaungatanga or kinship. Traditionally the whanau, at least three generations deep comprising more than two nuclear families and co-resident at a resource complex, was the centre of Māori life. It was the primary unit of close identity and belonging, the primary unit of social rights and obligations and, at a practical level at least, the primary unit of economic rights and obligations.

The whanau was, and still is, the essential glue that holds Māori culture together. In practical terms being Māori counts most at the intimacy of the whanau. Without whanau, being Māori is a mere abstraction. At the hapu level (involving multiple whanau all inter-related by descent), higher level political and economic rights and obligations cohered. The hapu was the primary political unit of Māori life during the first law period, and through its laws, economic rights were distributed to whanau and exercised (for the most part) at that level on whanau-specific resource complexes.

The colonisation process in the second half of the 19th century and the beginning of the 20th century stripped both the physical assets belonging to whanau and hapu, and their political and legal authority. That meant that by the 1920s, hapu and whanau were only relevant as co-residential social units based around traditional villages located on the remnant land base. Each had lost its core economic and political functions. By the 1960s, whanau and hapu were no longer even co-resident, as individual families decamped to the cities to find work away from land-poor village communities in the rural areas. Economic wealth then came not from kinship rights, but from the urban factory, rail yard or government job. And social control was imposed not by hapu and

77 There are a number of related Acts affecting environmental regulation in various ways outside the umbrella of the Resource Management Act that warrant brief mention because of their significance. Foremost among these is the Conservation Act 1987. Though narrow in subject, it is wide in application – governing around 30 per cent of New Zealand’s land surface and a wide swathe of our marine area. The conservation estate includes national parks, other Crown-owned native forests, river habitats, mountains, wetlands, and other precious landscapes and eco-systems. The Department is also responsible for about 1.28 million hectares of marine reserves and for the conservation of marine mammals and protected wildlife. Its work is of enormous importance to the Māori community and that community’s sense of connection to the landscape. Often the Department of Conservation (DOC) estate is the only place from which iwi can obtain flora and fauna for the maintenance of cultural practices. It is often also where iconic landscape features in Māori custom are found. As is well-known, s 4 of the Conservation Act 1987 requires that the Act be so interpreted and administered “as to give effect to the principles of the Treaty of Waitangi.” It is a powerful Treaty clause creating positive obligations. Time does not permit any kind of discussion of the implications of that section for the work of the Department of Conservation and the administration of the conservation estate, but it is sufficient to say that its effect has been to infuse tikanga Māori-based processes and considerations throughout the work of the Department in its various conservancies. The result has been relationships between iwi and local conservancies that are often close and co-operative approaching, at local levels, genuine Treaty partnerships. The models are of course not perfect. Problems arise and the law constrains how much iwi and hapu kaitiakitanga can be exercised within the DOC estate, although Treaty settlements are often loosening those constraints in local circumstances. I should mention also the Hazardous Substances and New Organisms Act 1996 whose provisions mirror pt 2 of the RMA and the Environmental Protection Authority Act 2011 which contains a Treaty provision in s 4 and continues the now disestablished Environmental Risk Management Authority’s Māori Advisory Committee in ss 18–21 whose purpose is to advise the new Authority on Māori perspectives.

whanau leaders but through the criminal justice system, the Social Welfare Department and in the Family Court.

Yet the whanau persists as an institution in the hearts and minds of Māori people, despite its multi-generational economic and social redundancy.

Again, as with Treaty rights, native title and environmental law, the great awakening in the law came in the 1980s. A Ministerial Advisory Committee on a Māori Perspective was drawn together in 1985 to advise the Department of Social Welfare (as it then was) on an appropriate Māori perspective for its activities. The Committee was headed by the respected Tuhoe leader, John Rangihau, and included leading members of the Māori community and public service. In 1986 it produced a report, still widely cited, called *Puao-te-Ata-tu*.⁷⁸ This report changed the game. It drew attention to the deeply monochromatic nature of New Zealand's family laws and policies. For the first time in an official journal, it told the story of Māori custom and the whanau and the struggle of Māori communities to maintain the relevance of that institution in the face of laws inconsistent with its continued life.

It became a key driver of the Children, Young Persons, and Their Families Act 1989 (1989 Act) in which court intervention is mandated where a child is in need of “care and protection”. The legislation picked up references in *Puao-te-Ata-tu* emphasising that a Māori child's life needs to be seen within a kin matrix – whanau, hapu and iwi. Section 5 contains the principles of the Act and its support for whanau, hapu and iwi life in making decisions under the Act in respect of Māori children is clear. The essential principles are that whanau, hapu and iwi should participate in decisions under the Act wherever possible; their views should be considered by deciders; connections to whanau, hapu and iwi should be maintained and strengthened; and the stability of whanau, hapu and iwi should be a matter of judicial consideration.

These principles are subject to the overriding welfare and interests of the child or young person provided for in s 6. It seems that the two provisions are drafted so as to be in tension and they are often interpreted that way. The individual child versus the whanau. But that need not necessarily be so, provided it is accepted that the best interests of a Māori child will always be, to some extent or other, in attachment to the kin matrix. If that is accepted, the real challenge for the law is *how* to achieve continued attachment if a whanau is genuinely dysfunctional, not *whether* to do so. My impression from reading the leading cases is that the Family Court is not at that point. At least not yet. And the wider kin group – hapu or iwi – is not yet at the centre of decision-making.

Section 187 of the Act allows the court to call for cultural reports. I understand from discussions with judges that these are not often utilised. Nor do counsel tend to push for them. I address similar provisions in the sentencing context below.

The greatest innovation in the 1989 Act was the introduction of the Family Group Conference. In a Māori context, this amounts to the reintroduction as far as is possible (usually now in an urban context) of whanau decision-making (at least it can mean that if administered according to the Act's spirit). Sections 20 to 38 provide an opportunity for the whanau to come together and find an internally-generated solution to the care and protection problem that they confront. It tries to replicate, albeit in a very attenuated form, the old social control role of the whanau under tikanga.

The old, and very out of date Guardianship Act 1968 was replaced by the Care of Children Act 2004 (2004 Act). It too made extensive reference to whanau, hapu and iwi in its principles

⁷⁸ Māori Perspective Advisory Committee *Puao-te-Ata-tu: The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare* (Department of Social Welfare, SW 470, September 1988).

section (s 5). In s 16 there is reference to the guardian's responsibility to contribute to a child's cultural development, and there is reference also to language.

Section 133 provides for cultural reports (again, I understand from discussions with judges, under-utilised both by Bench and counsel), and s 136 allows a party to seek leave to be heard on matters of cultural background.

Yet s 4 still refers to the paramountcy of the interest of the child and the structure of ss 4 and 5 has been roundly criticised in taking a primarily individualistic approach to issues of care in preference to the child's place within whānau, hapū and iwi. Professor Bill Atkin made this comment in 2006:⁷⁹

The Care of Children Act 2004 makes passing reference to Māori values but not in any meaningful way – indeed in a totally confusing way. For example, section 5(b) says that “the child's relationships with his or her family, family group, whanau, hapu, or iwi, should be stable and ongoing” which is fine, but then is confounded by a bewildering phrase in brackets which reads: “in particular the child should have continuing relationships with both of his or her parents”. The Care of Children Act 2004 is a muddle as it is, but to have the muddle so manifest by the juxtaposition of these concepts is bizarre.

Once again we see the conflict between these two cultural and legal world views: kin obligations versus individual autonomy. It can also be seen in the failure of the Act to empower whanau and hapu members to apply for parenting orders as of right. Parents, step-parents and guardians can apply, but any other person including a member of a child's whanau can only do so with leave. Judge Annis Somerville in her article “Whanaungatanga in the Family Court”⁸⁰ was nonetheless optimistic that the structure of the 2004 Act can be seen as “a step towards a third space that incorporates positive aspects of all cultures present in New Zealand.” She may ultimately be proved right, but it is fair to say that the jury is still out.

A key problem with the 2004 Act is its lack of an equivalent to the Family Group Conference in the 1989 Act. That means that unless things have become so problematic as to warrant asking whether the child is in need of care and protection, the wider whanau has no mandate to participate in decisions under the Care of Children Act 2004. This must be seen to be a significant gap in light of the importance of decisions under the Act and the centrality of the whanau role in such decisions in Māori custom.

That leaves the old Adoption Act 1955. Curiously, that Act contains none of these modernising third law sensitivities, even the more modest ones to be found in the 2004 Act. The Adoption Act seems entirely based on the closed stranger adoption model, and there is no recognition of the still very much alive custom of whangai adoption.

C. *Family Conclusion*

There is evidence then of significant progress in early renaissance legislation (1989) but some second law legislation still survives and a key 21st century instrument appears to be deficient in recognising the centrality of whanau and hapu in custom both traditionally and in modern life.

Whanaungatanga has not advanced appreciably as a value in family law since the initial model

79 Bill Atkin “Harmonising Family Law” (2006) 37 VUWLR 465 at 477.

80 Annis Somerville “Whanaungatanga in the Family Court” (2006) 5 NZFLJ 140 at 141.

of whanau engagement was adopted in 1989. Indeed if Professor Atkin is to be believed, it may even have regressed.

While tribes have taken sole or shared responsibility in some areas of environmental regulation through Treaty settlement negotiations, there has been no equivalent development in the family law area. Iwi social service organisations remain in their limited roles as contracted providers of government services. There is no steady development toward iwi uptake of *jurisdiction*. This was not the vision of the Puao-te-Ata-tu Committee in 1986. Where iwi and the Crown have found natural synergies between environmental regulation and Treaty settlements, the same opportunities have not been found with respect to the law regulating families – at least not yet. This is frankly surprising.

I understand that iwi negotiating their settlements are now including discussions over arrangements for addressing iwi social issues. Tuhoe is leading the way here. Late settling iwi want to take back control in a manner that approximates the position they held under the first law. As with environmental law, Treaty settlements may end up being the driver for change in family law. And as with environmental law, that is because players in the family law system from policy-makers, to judges, to counsel, to operational agencies such as Child Youth and Family have not seen the opportunities.

VI. MĀORI LAW IN LEGISLATION – THE LATE ADOPTERS

A. *Crime*

Is there room for tikanga Māori in the core state function of law enforcement? There have been a number of significant cases in which that question was explored.

In the *R v Mason* case, Tamati Mason was charged with murder.⁸¹ He sought a ruling that he should be dealt with in accordance with tikanga Māori, the argument being that such a system still exists in parallel to the Crimes Act-based criminal justice system. Not surprisingly Heath J ruled against him, in an orthodox, though sympathetic treatment of the issue. Heath J found that the Crimes Act crowded out any possibility of an alternative criminal justice system, even if one existed. Unsurprisingly, the Court of Appeal agreed with the basic point.⁸² Both courts doubted, in any event, that a parallel system of adjudication existed in fact after many years of neglect in the second law period. Even the evidence of lawyer and expert defence witness, Moana Jackson, was that the Māori community is rebuilding its customary structures and it would be some time before such a system could be fully operational.

Heath J, however, did not stop there. He went further:⁸³

The finding that a parallel customary system is precluded by statute does not exclude the possibility of custom playing a meaningful role in criminal proceedings, provided it can be accommodated within the existing statutory system.

I interpolate here to note that s 8(i) of the Sentencing Act 2002 makes it mandatory for a sentencing

81 *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695.

82 *Mason v R* [2013] NZCA 310 at [35].

83 *R v Mason*, above n 81, at [38].

court to take account of an offender's whanau, community and cultural background. It was no doubt with this provision in mind that the Judge continued:⁸⁴

Indeed, where both offender and victim are Māori and there is no issue as to guilt, such processes may be more appropriate to address the needs of those directly involved in the offending, leaving to one side the distinct interest of the community in the imposition of a sentence that adequately marks the offending.

The Judge was at pains to point out that he was not advocating a separate Māori system of sentencing, rather that culture and custom are matters that will often be relevant to the Judge's sentencing exercise. But the more serious the offending, the more significant the wider community interest in the punishment meted out, and by implication, the less room for custom and culture to play a role.

In the area of sentencing, judicial policy in particular has occasionally been innovative. Judges have been active in promoting the Rangatahi courts – a somewhat parallel system of marae-based Youth Courts, and the Matariki sentencing court, operative in Kaikohe in the Far North.

The Rangatahi Court process is generally seen as a positive and therapeutic model for youth offenders. Māori communities have embraced it and called for its expansion. But Judge Heemi Taumaunu, its leader, would be the first to accept that the Rangatahi Court has important limitations. The offender's first appearance is always in the mainstream Youth Court, and both the victim and offender must agree to the referral to the Rangatahi Court. The Court's jurisdiction is triggered once a Family Group Conference is completed and the Court may monitor the plan agreed at the Family Group Conference. Cultural components are strong in the process, with a powhiri, karakia, a requirement that the offender address the court in Māori, even if in a basic way, discussions between kaumatua sitting with the judge and the offender, and hongi at the end of each appearance. The Rangatahi Court was independently reviewed at the end of last year, and early signs are very positive. The model will undoubtedly evolve and grow over time.

The Matariki Court was first conceived by the late Chief District Court Judge Russell Johnson, who saw a particular need to address Māori offending in rural tribal areas using the power and support of whanau, hapu and iwi. The process was designed and consulted on by Judge Johnson and Judge Rota (now retired).

The Matariki Court operates in Kaikohe. It is designed as a technique to engage the offender's whanau, hapu and iwi in the sentencing process. It is an attempt, in a heartland tribal area, to engage with the old kin structures in constructing and monitoring sentences. A local kaumatua is co-ordinator or kairuruku. I understand Judge Greg Davis takes the lead judicial role in the Matariki Court. He is Nga Puhi and well-known and respected in the community. Once again, early indications as to success are positive.

The Matariki Court in particular was seen as a "s 27 Court"; a court that focuses on receiving information from whanau about cultural and family background in order to inform the sentencing process in accordance with the information gathering mandated by s 27 of the Sentencing Act 2002. Early signs are, as I say, good. There is every reason to support its expansion into other heartland tribal areas.

These are the positive examples, but s 27 of the Sentencing Act is a generally applicable provision in all sentencing. The provision is compulsory in the sense that if a person asks to address the Court

84 At [39].

on the matter of whanau and cultural background, then the Court must hear that person provided they are called by the offender, unless the Court is satisfied that there is some special reason not to hear him or her. And the Court may call for such information or report of its own motion even if there is no request. Information can be provided on any dispute resolution or therapeutic processes that have been undertaken with the victim; whanau or community supports around the offender, and any background relevant to possible sentences. Such reports could be of enormous importance in transferring responsibility and some level of control of the sentencing exercise to the offender's whanau and on a much wider scale than just the Rangatahi and Matariki Courts.

This provision addresses the same issue as s 718.2(e) of the Canadian Criminal Code – the subsection that gave rise to the judgment of the Canadian Supreme Court in *R v Gladue*.⁸⁵ Section 718.2(e) is less detailed than s 27. It simply requires that a sentencing court must consider the principle that:

All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with *particular attention to the circumstances of aboriginal offenders*. (Emphasis added.)

But it does say that non-custodial sentences must be a particular focus for the courts in sentencing aboriginal offenders. The Canadian Supreme Court considered that the provision was enacted to ameliorate systemic discrimination against aboriginal offenders in the criminal justice system. The significant over-representation of indigenous Canadians in the criminal justice system, and in prison in particular, was, the Court said, the underlying reason for the statutory direction to search for alternatives.

In *Gladue*, the Supreme Court required sentencing courts, when sentencing aboriginal offenders, to obtain information (later dubbed a *Gladue Report*) on the aboriginal offender's social and cultural background so as to assess the degree to which systemic and background factors unique to aboriginal offenders have played a role in the offender's life and the offending. The factors, the Court said, will often include poverty, substance abuse, poor education, poor employment opportunities, cultural dislocation and so on. The decision changed the way courts across Canada sentenced aboriginal offenders.

There has obviously been some level of judicial push back in the lower courts in Canada since *Gladue*, because the Canadian Supreme Court took two more bites at the issue in *Wells*⁸⁶ and in *Ipeelee*⁸⁷ in 2012. *Ipeelee* in particular deserves more attention than can be given in the context of this lecture. The careful and sensitive judgment of LeBel J writing for all of the panel except Rothstein J, retraversed the Court's reasons for requiring sentencing judges to give particular consideration to the sentencing needs of aboriginal offenders.

The Court recognised the reality of economic and cultural loss during the colonial period; modern poverty and dysfunction, as well as differing cultural approaches to criminal justice. In particular, LeBel J emphasised the terrible incarceration asymmetry for indigenous Canadians as clear evidence that Canada's sentencing policy and practice was discriminatory and counterproductive. The Judge rejected academic, political and legal criticism of the *Gladue* approach. He confronted head-on claims that aboriginal over-representation in prison could not be addressed through individual

85 *R v Gladue* [1999] 1 SCR 688.

86 *R v Wells* [1998] 2 SCR 517.

87 *R v Ipeelee* [2012] 1 SCR 433.

sentences; that *Gladue* mandated an unjustified race-based discount; and that the requirement to treat aboriginal offenders differently for that reason alone amounted to reverse racism. The Court explained why focusing on aboriginality and its impact on life experience was still consistent with a principled approach to sentencing.⁸⁸

Section 718.2(e) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them.

Similar ideas were expressed in respect of aboriginal sentencing in Australia (without the aid of s 718.2(e)) by the New South Wales Supreme Court Criminal Division as early as 1992 in *R v Fernando*.⁸⁹

Section 27 of the New Zealand Sentencing Act, by contrast, is rarely used outside the Rangatahi and Matariki Courts. To be sure, the Sentencing Act does not require it to be applied to every sentencing of a Māori offender. But s 27 is clearly aimed at addressing the incarceration asymmetry in the Māori community through culturally specific sentencing to fit the circumstances of the offender just as the Canadian provision is. Such reports have the potential to trigger customary processes of the kind identified by Heath J in *Mason*. They have the potential to change sentencing practices in respect of Māori. The statistics suggest trying something different on a wider scale cannot possibly do any harm.

I note Heath J's discomfort with culturally-based sentences in more serious crimes. That is understandable at an intuitive level. But, as the Canadian Supreme Court makes clear in *Gladue* and even more forcefully in *Ipeelee*, culture and background will *always* be relevant to sentencing, if the sentence is to fit not just the crime but the offender. The discomfort with alternative approaches the further up the scale of seriousness one gets is, in my view, if unconsciously, political rather than logical. Judges are very sensitive to potential community backlash.

Thus, while there is no longer room for tikanga-based approaches to the criminal verdict inquiry, there is substantial room for tikanga to speak in the sentencing process and therefore, for whanau and hapu to wrest some measure of control back to the kin group – a limited return to first law processes. The Rangatahi and Matariki Courts are a start but in reality they have barely scratched the surface. After all in a whanaungatanga-based culture, kin group responsibility for the wrongs committed by a member of the group is assumed. The tikanga of muru reflects that basic idea. Finding means by which that kin group can participate in sentence selection processes, whether therapeutic or otherwise, assists the kin group and therefore the wider community to take responsibility for offenders in a manner consistent with tikanga Māori and good criminal justice practice.

Before leaving the criminal law, I should mention the very recent decision of the New Zealand Court of Appeal in *Mika v R* in which Harrison J, writing for a unanimous divisional court, roundly

88 At [75].

89 *R v Fernando* (1992) 76 A Crim R 58 (NSWSC).

rejected the submission that Māori offenders should receive an automatic 10 per cent discount for reasons similar to those expressed in *Gladue* and *Ipeelee*.⁹⁰

The result was unsurprising given the unsophisticated way, to say the least, in which the case was argued and the fact that there was no s 27 report to support a more carefully calibrated approach to the sentence. As Harrison J said:⁹¹

An appeal heard before a Divisional Court of this Court, advanced without the benefit of argument developed on a proper evidential foundation, is not the place for a discourse on sentencing principles and policy.

The Court did not however take up the opportunity to address whether a different approach might be required in the *process* of Māori sentencing as so comprehensively advocated in *Ipeelee* for indigenous Canadians. Given that Māori over-representation in prison is just as significant an issue in New Zealand as it is for indigenous peoples in Canada and Australia, it is inevitable that jurisprudence from those jurisdictions will continue to be called upon by counsel in New Zealand. An argument built on a proper evidential foundation drawing upon insights from jurisdictions with similar problems will inevitably come before the courts and soon. The dialogue that will inevitably be generated will be healthy.

B. Intellectual Property

There is insufficient time in the context of this lecture to do more than touch on this broad and complex subject. For the most part, intellectual property law has belonged to the second law category; law that has been at best blissfully unaware of the existence and relevance of the first law, and at worst intended to override it. The relationship between tikanga Māori and intellectual property law has been the subject of extensive discussion in the Wai 262 report of the Waitangi Tribunal.⁹²

In that report the Tribunal talked about the kaitiakitanga relationship between iwi and hapu on the one hand and their matauranga Māori and indigenous flora and fauna on the other hand. The Tribunal recommended significant changes to copyright, patent and trademarks law to better protect that kaitiakitanga. It is, after all, a product of the kinship relationship between humans and what the Tribunal called “taonga species” and matauranga Māori.⁹³ For the most part that is not a discussion about a Māori dimension in modern New Zealand intellectual property law but rather about the *lack* of a Māori dimension in modern New Zealand intellectual property law and the need to make changes to introduce that dimension to the legal discourse. This is not the place to reprise those issues.

There are two areas however where the current law does make provision for some form of recognition of matauranga Māori and kaitiakitanga relationships. It is worth pointing those out.

The first is in ss 177 to 180 of the Trade Marks Act 2002, the provisions that create and regulate the operation of a Māori Advisory Committee to the Commissioner of Trademarks. The function of the Committee is, according to s 178:

90 *Mika v R* [2013] NZCA 648.

91 At [7].

92 Waitangi Tribunal, above n 2.

93 At 63–104: taonga species are species of flora or fauna having special significance to iwi, while matauranga Māori is best translated as Māori traditional knowledge.

[T]o advise the Commissioner whether the proposed use or registration of a trade mark that is, or appears to be, derivative of a Māori sign, including text and imagery, is, or is likely to be, offensive to Māori.

The Committee is appointed by the Commissioner of Trademarks but appointments must reflect the appointee's knowledge of te ao Māori (Māori world view) and tikanga Māori (Māori protocol and culture).

I understand that the Committee is extant and active in the work of Intellectual Property Office of New Zealand.

The recent review of the Patents Act has created a similar Advisory Committee in ss 225 to 228 of the new 2013 measure. That Committee is to be constituted by the Commissioner of Patents with similar qualification requirements. Its function (s 226) is to advise the Commissioner (on request) on whether:

- (a) an invention claimed in a patent application is derived from Māori traditional knowledge or from indigenous plants or animals; and
- (b) if so, whether the commercial exploitation of that invention is likely to be contrary to Māori values.

According to s 227, the advice of the Committee must be considered but is not binding. According to s 15(3), the Commissioner may also seek advice from the Māori Advisory Committee in deciding whether patentability of an invention would be contrary to "public order" (as that term is used in the international Trade-Related Aspects of Intellectual Property agreement) or "morality".

The impact of the Māori Advisory Committee on patentability questions has yet to be tested as far as I know.

To be sure, these provisions are relatively weak. They make matters of Māori values and custom relevant if the Commissioner triggers an inquiry but (in the patents case) not otherwise. And even if they are relevant, the Committee's view will not be binding. Nonetheless, this is a small inroad into two traditional private law areas previously untrammelled by tikanga Māori. They are each in small ways mechanisms by which consideration of whanaungatanga, kaitiakitanga and tapu may be imported into the allocation of private intellectual property rights affecting custom, identity and culture.

There is considerable activity at the international level in respect of traditional knowledge, interests in indigenous species and intellectual property. Both the World Trade Organization and the World Intellectual Property Organization are now actively engaged in reform discussions. Where these issues will go both internationally and locally is hard to gauge, but it is clear that these advisory committees are most unlikely to be the last word on the Māori dimension in intellectual property.

C. Public Law

This is an area I thought worth mentioning not because of any particular Māori dimension currently extant in the broad category we call public law, but because of what appears to be sitting on the horizon. I set aside in this discussion any question of substantive or procedural rights that arise from the Treaty of Waitangi whether expressed or implied in legislation. That is covered elsewhere in this lecture. What I want to discuss here arises because of the creation of quasi-public law entities in the Treaty settlement process.

The matter of the quasi-public nature of iwi authorities is separate and new. New primarily

because historically the law has never recognised tribes as having legal personality. Now there is such recognition as a matter of course at the conclusion of a Treaty settlement, usually through a special constituting statute that provides for decision-making power internal to the tribe, and in some cases, the right to exercise public powers affecting non-iwi members.

As I have said earlier, this external power has been, by and large, in the environmental regulation area but similar powers are contemplated with respect to coastal space, the administration of certain public reserves and so forth. Will these iwi bodies be amenable to judicial review? They certainly will be when exercising statutory discretions. The question in such cases will be whether customary law and values (first law questions) will be relevant in considering the legality of that exercise. And if the answer to that question is yes, the next question is what the applicable customary laws and values might be. Either iwi or individual members will be arguing that the interstices of the empowering statute should be backfilled or coloured with content imported from the first law. Kaitiakitanga will be argued for. Good faith and reasonableness will not be enough. It will become hard to extricate custom from statutory discretion as a source of reviewability. That must surely be so if *Huakina* and *Takamore* are to be applied according to their spirit.

Watch this space!

VII. AN ATTEMPT AT SOME CONCLUSIONS

I started from the proposition that law in New Zealand has been laid down in layers: the first law of Aotearoa; the second law of New Zealand; and the third law of Aotearoa/New Zealand. We are, I suggested, in the third layer. But it does not seem to me on reflection to be as simple as that. I have not, in this lecture, had to dig up the first layer to show you what the law in New Zealand used to be like. This has not been an exercise in legal archaeology. The first law exists in the present tense too. In fact all three layers are still alive and interacting organically. There is therefore more depth and tradition in our untidy legal eco-system than I had originally contemplated.

At the beginning of the lecture I posed some simple questions in the hope that in writing I might turn up some answers. The first question was is there a coherent dimension in New Zealand's law called Māori law? The answer is that if Māori law coheres at all, the first law is its glue. The first law is the common denominator joining disparate areas of the third law together. Essential principles such as whanaungatanga and kaitiakitanga speak to questions around genetically modified organisms or assessing the offensiveness of trademarks, just as they speak in child placement decisions of the Family Court, the Environment Court's consideration of Māori relationships with rivers, or the High Court's assessment of a claim to title to the foreshore. It is, I conclude, by dint of a living first law, possible to posit that there is indeed a coherent body of legal principle and doctrine called Māori law.

The next question I posed was whether, if there is such a body of law, it can be mapped and its effect on New Zealand law more generally measured? The answer is of course yes. The model consistently adopted in the third law phase for expressing first law principles is what might be called the "integrate-to-perpetuate" model, where first law values are drawn into mainstream decision-making and expressed in that context. I have pointed to many examples of this approach in legislation. But the courts seem also to have adopted this approach in judge-made law – I mentioned *Huakina* and *Barton-Prescott*, but the most significant and recent example is the innovation adopted by all five of the Supreme Court Judges in *Takamore*.

In this, the New Zealand approach is to be contrasted with the "separate-to-survive" model

preferred in common law jurisdictions addressing similar issues: most clearly the United States and to a lesser but still significant extent, Canada. The reason for this difference is probably scale. The Americans and Canadians have a continental state of mind. We, by contrast, have an island state of mind. There are practically far fewer opportunities here for effective jurisdictional separation. We lack the scale of the North Americans. But as Tuhoe reminds us with their Treaty negotiation campaign to re-educate the Crown integrationists, opportunities for legal separation still remain to be explored in New Zealand law and politics.

Looking at the various modern legal silos in a single snapshot has turned up some surprising insights, beyond the obvious point that they are sites in which, to a greater or lesser extent, the principles of the first law survive as modern law. First, the first law is still fragile law today. A common theme in the integrate-to-perpetuate model is that first law principles are often discretionary for decision-makers and the weight afforded them often intentionally limited. This use of techniques to limit the impact of minority rights and interests on the majority or on majority sensibilities is common in western democracies and particularly so in post-colonial societies with indigenous minorities. New Zealand is no different. A frequent result of this discretionary recognition is that optional systems put in place in our statutory or common law regimes to implement the first law are just not used. The failure of local government to implement power sharing and delegation provisions in the RMA is the most spectacular example of this, but the failure of sentencing and family courts to make use of special report procedures in the Sentencing Act 2002, the Children, Young Persons, and Their Families Act 1989 and the Care of Children Act 2004 are nearly as significant.

The reasons for this systemic failure appear complex. In the RMA context local authority reluctance and limited capacity are likely culprits. The reluctance is probably both attitudinal and majoritarian. Power transfer takes courage and vision. And some re-education. In sentencing and family law, part of the problem is the failure of counsel to require judges to engage with culture and context through the specific reporting procedures in the legislation. This is to be contrasted with the Canadian context as I have discussed. The rest of the problem may well be that judges are untrained and therefore poorly equipped to address the issue even if it comes up. I am minded therefore to put this worryingly widespread problem down to a conspiracy of unintended slip-ups. My own experience of judicial colleagues is that most are aware of the imbalance of Māori participation in the criminal and family courts and are willing both professionally and personally to address it. They just don't quite know where to start.

That brings me to a deeper problem that contributes to the particular failure I have identified but is in fact a wider cause of underperformance.

In most litigation where first law issues arise, the judge will not be an expert in that subject. That is an inevitable result of the mainstreaming integrate-to-perpetuate model preferred in this country. Most judges who must weigh and apply tikanga in their work (or choose not to do so), will never have heard of whanaungatanga or kaitiakitanga. It is not good enough, in my view, to treat the first law as a conflict of laws question in which judges must be educated case by case through expert evidence as to the content of that law. We should be well past that point now.

The third law proceeds on the basis that tikanga Māori is not foreign and separate but rather integrated and mainstream. If that is so, then the judiciary needs to up its game. I am pleased to say that New Zealand's judiciary now generally agrees. There is cross-Bench consensus that we need to educate ourselves in these matters. Last year the New Zealand Institute of Judicial Studies began to plan a programme of study in the first law for judges. It is due to be implemented this year. It is a start (at last) but there is still much to do.

Well, I have found cohesion in a body of law that can be called Māori law; I have, by taking a snapshot of the third law of Aotearoa/New Zealand, found dots to join between legal silos that were not obvious to me. The last question I promised to ask is whether there were hints in those connections about future developments in this law? I think there are.

Whata J, in an excellent lecture entitled *The Evolution of Legal Issues Facing Māori*, described the 1980s and 1990s as producing a Cambrian explosion of Māori issues law – both legislative and judge-made.⁹⁴ I agree entirely and the metaphor is particularly apt. That explosion has borne extensive fruit in some areas: iwi engagement in environmental regulation and Treaty settlements in particular has produced important legal change and still does so. But other areas have become evolutionary cul-de-sacs by comparison. I have identified sentencing and family law generally as areas in apparent stasis despite the obvious challenge the Māori community presents in each field.

In environmental management iwi have worked hard to force change through Treaty settlements when the mechanisms in the RMA failed to do so. That process continues. In family and sentencing it may well be that iwi are now beginning to shift their energies so as to force change in system failures there too. Tuhoe, Ngapuhi, Muriwhenua and other iwi are now arguing, with some success, for a stronger role in these areas. These will be areas of dynamic legal change in the next decade.

Another area is the role of the first law in the distribution of private rights in culture and knowledge. I have mentioned limited changes in trademarks and patent legislation, but as the Waitangi Tribunal in the Wai 262 claim has pointed out, these issues are not unique to New Zealand. There is an international movement for the protection of the first law rights of indigenous people in this area. Both the World Intellectual Property Organization and the World Trade Organization are engaged. Further developments are therefore inevitable here too.

Finally, I would reiterate that the rise and rise of post-settlement iwi corporates exercising statutory functions affecting both their own members and the wider community will affect public law doctrines in potentially significant ways.

One consequence of the mainstreaming of the first law is that judges must decide what the applicable tikanga is. I spent some time summarising the travails of the environment and appellate courts in this area. As judges become better trained to address tikanga Māori, will they become agents of its change? Will the first law still be made on the marae as it has for a millennium, or in the court room? Will the first law evolve in the way that the common law did: from a system of local custom to a more positivist system of judge-made law? These are issues judges and the Māori community will be working through over the next generation.

Lex Aotearoa is very much alive. It is still fragile but its survival is more certain now than in the past. It is demanding that we change to address its challenges. I hope we Aotearoans are up for it.

94 Christian Whata “The Evolution of Legal Issues Facing Māori” (paper presented to Māori Legal Issues Conference, Legal Research Foundation, Auckland, 29 November 2013).