

**ME MAU NGĀ RINGA MĀORI I NGĀ RĀKAU A TE PĀKEHĀ?  
SHOULD MĀORI CUSTOMARY LAW BE INCORPORATED INTO  
LEGISLATION?**

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A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours), at the  
University of Otago - Te Whare Wānanga o Otākou

October 2009

## ACKNOWLEDGEMENTS

*Ehara taku toa i te toa takitahi, engari he toa takitini*

My strength is not that of a single warrior but that of many

This commonly used *whakatauki* or proverb applies to a situation where the combined efforts of many are needed to complete a project. It aptly applies to this dissertation as although my name is on the front cover of this thesis I cannot take sole credit for the final product.

To John Dawson, words cannot express how much I appreciate your input and tireless supervision of this dissertation. You helped me to expand my conceptual limits and produce a piece of work that I am proud of.

To Wayne Roia, *te tau o taku ate*, thanks for keeping it real. It has been a long and hard journey and your love and support over the last eight years is duly noted.

A massive thank you to my family, in particular my mum and dad, who are the best parents ever and have supported me unconditionally in everything that I have done.

Also to Jill and Merle Coles for their exceptional proof reading skills, I owe you both a beer.

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## GLOSSARY OF MĀORI TERMS

<i>Aroha</i>	to love, feel concern for
<i>Atua</i>	god, ancestor with continuing influence
<i>Hapū</i>	sub-tribe
<i>Hui</i>	gathering, meeting, assembly
<i>Iwi</i>	tribe, extended kinship group
<i>Kaitiakitanga</i>	guardianship
<i>Kaumātua</i>	elderly person
<i>Kāwanatanga</i>	government
<i>Koha</i>	gift, present, offering
<i>Kōiwi</i>	bone of humans
<i>Mana</i>	prestige, authority, control, influence
<i>Manaakitanga</i>	to care for, kindness
<i>Marae</i>	a complex with a ceremonial courtyard
<i>Ōhākī</i>	dying speech, deathbed wish
<i>Rāhui</i>	temporary ritual prohibition, closed season, ban, reserve
<i>Take tuku</i>	system of land transfer
<i>Tangata tiaki</i>	guardian
<i>Tangata whenua</i>	people of the land, local people
<i>Tangihanga</i>	funerary practice
<i>Tāonga</i>	treasure, something highly prized
<i>Tapu</i>	sacred, prohibited, area under a supernatural condition
<i>Tikanga</i>	correct procedure, custom,
<i>Tinorangatiratanga</i>	sovereignty, chieftainship
<i>Tohunga</i>	skilled person, expert
<i>Tūrangawaewae</i>	standing place, domicile, place where one has rights of residence

<i>Tūpuna</i>	ancestors, grandparents
<i>Utu</i>	reciprocity
<i>Wairua</i>	spirit, soul
<i>Whakapapa</i>	genealogy
<i>Whakatauki</i>	proverb
<i>Whanaungatanga</i>	relationship, kinship, sense of family connection
<i>Whāngai</i>	foster child

## INTRODUCTION

Every legal system has to address the issue of the autonomy and authority of other normative orders with which it coexists.<sup>1</sup> Dominant legal systems thus have to face the question of how to recognise, supervise or suppress the other normative systems within their jurisdiction.<sup>2</sup> In respect of Māori customary law the approach of the New Zealand state legal system has been to essentially deny its validity as a source of law operative in its own right. This system has instead chosen to put ‘a bit of Māori into particular laws’.<sup>3</sup> This statement refers to the undeniable fact that nestled within the pages of NZ’s statute books are many references to Māori interests, aspects of *tikanga* Māori or Māori customary law.<sup>4</sup> Māori customary law, the focus of this dissertation, has thus been injected into legislation in a number of different forms and for different reasons.<sup>5</sup> However, there has been little direct discussion of the general merits and disadvantages of this sort of incorporation. Is it better for traditional Māori norms to be recognised in legislation, and thus given currency and some enforceability in the mainstream legal arena? Or does this incorporation constitute a final and humiliating colonisation and freezing of Māori culture? This dissertation recognises a more extensive examination and balancing of the dangers and benefits arising from the recognition of traditional Māori norms in legislation, is required.

In asking the question: should Māori customary law be incorporated into legislation, I recognise any answer will be highly qualified, as not only will it depend on individual and differing perspectives, but also on the custom in question and the form in which it is legally recognised.

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<sup>1</sup> Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law" (1986) 24 *Journal of Legal Pluralism* 28.

<sup>2</sup> Ibid.

<sup>3</sup> Eddie Durie cited in Dawson, J, "The Resistance of the New Zealand Legal System to Recognition of Māori Customary Law" (2008) 12(1) *Journal of South Pacific Law* 56  
<<http://www.paclii.org/journals/fjspl/vol12no1/pdf/dawson.pdf>> accessed 22 September 2009, 58.

<sup>4</sup> Note that the definition of ‘Māori customary law’ will be discussed in Chapter One. Also this dissertation will go onto discuss a number of examples in which Māori customary law has been incorporated into legislation.

<sup>5</sup> Examples range from the recognition of Māori customary fishery rights in section 88(2) of the Fisheries Act 1983 to the contemporary references in the Resource Management Act 1991 to Māori customary concepts such as ‘*kaitiakitanga*’.

This dissertation therefore simply aims to highlight the different arguments and aspects of this debate. In doing so, not only may it prompt legislators to thoroughly consider the implications and statutory form of an incorporation of Māori customary law, but it could also aid Māori in considering whether they should support this type of incorporation.<sup>6</sup>

Chapter One of this paper contextualises the issue by firstly defining the notion of ‘Māori customary law’ that is employed. It then turns to examine the various ways in which Māori customary law can interact with the state legal system, in an attempt to highlight the significance of statutory incorporation. Following that, it addresses how the law has historically treated Māori custom. Finally, it looks at two different ways in which legislation can embody Māori customs and laws.

Chapter Two addresses some positive and negative aspects of integrating Māori customary law into statute. It focuses on its effects, such as the perpetuation of the colonial legal system, the tyranny of the parliamentary process, the impact of non-Māori decision makers, and notions of equality.

Chapter Three looks at three specific forms in which Māori customary law can be incorporated into law, namely, incorporation by recognition of Māori authority to apply a customary norm, incorporation of a single Māori word or custom, and incorporation via extensive codification of customary norms. The positive and negative aspects of these particular forms of incorporation are examined.

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<sup>6</sup> The Māori title of this dissertation ‘*Me mau ngā ringa Maori I ngā rākau a ngā Pākehā?*’ is a modified question derived from the Māori proverb: *Ko tō ringa kē ngā rākau a te Pākehā, hei oranga mō tō tinana. Ko tō ngākau kē ngā taonga a o tīpuna, hei tikitiki mō tō mahunga.* This is a *whakatauki* by Sir Apirana Ngata, which translates as: ‘In your hands the tools of the Pākehā, as means to support and sustain you, in your heart the treasures of your ancestors, as a plume for your head’ (see Mead, H M and Grove, N *Ngā Pepeha a ngā Tīpuna* (Victoria University Press, 2001) 48. This proverb indicates what Sir Apirana Ngata believed Māori needed to do in order to preserve and advance their culture. It proposes that for Māori development to advance, Western philosophies and ideas need to be embraced and adopted by Māori society whilst also ensuring that their ancestral links and identity are maintained. This dissertation questions whether Māori should embrace the adoption of their own customary laws into the state legal system or whether this occurs at the expense of their traditional customs.



Ultimately, this dissertation highlights both the general implications of the incorporation of Māori customary law into legislation and some advantages and disadvantages that flow from specific aspects of the statutory design.

# CHAPTER ONE: CONTEXTUALISING THE CONCEPT OF MĀORI CUSTOMARY LAW

## Identifying Māori Customary Law

‘Māori customary law’ is a difficult notion to define as there are divergent and overlapping ways of looking at it. I do not attempt to delineate the substantive content of Māori customary law. However, in a broad sense, Māori customary law is a phrase used to indicate the body of rules developed by Māori to govern themselves.<sup>7</sup> Or, in another way, Eddie Durie, the great Māori jurist, describes Māori customary law as “[the] values, standards, principles or norms to which the Māori community generally subscribed for the determination of appropriate conduct”.<sup>8</sup> Employed in this manner, Māori customary law can be likened to the Māori conception of ‘*tikanga* Māori’ which, according to Hirini Moko Mead,<sup>9</sup> is:

...the set of beliefs associated with practices and procedures to be followed in conducting the affairs of a group or an individual... 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.<sup>10</sup>

Ani Mikaere further describes *tikanga* Māori as the law which serves the needs of the *tangata whenua* (people of the land) and believes it is based on a set of underlying principles that have stood the test of time: including *whakapapa*,<sup>11</sup> *whanaungatanga*,<sup>12</sup> *mana*,<sup>13</sup> *manaakitanga*,<sup>14</sup> *aroha*,<sup>15</sup> *wairua*<sup>16</sup> and *utu*.<sup>17</sup>

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<sup>7</sup> The New Zealand Law Commission *Māori Custom and Values in New Zealand Law*, Study Paper 9 (The Law Commission, 2001) 15.

<sup>8</sup> Durie cited in *ibid*, 16.

<sup>9</sup> Retired Professor of Māori Studies at Victoria University of Wellington.

<sup>10</sup> Mead, H M *Tikanga Māori: Living by Māori Values* (Huia Publishers, 2003) 12.

<sup>11</sup> This translates as genealogy. Note that translations for Māori words in this dissertation are generally taken from *Williams Dictionary of Māori Language* (Legislation Direct, 2006).

<sup>12</sup> The maintenance of kinship relationships.

<sup>13</sup> Prestige, authority, control, influence.

<sup>14</sup> This translates as ‘to care for’.

<sup>15</sup> The English equivalent is ‘love’.

<sup>16</sup> This notion encompasses ideas pertaining to the spirit and the soul.

This particular notion of Māori customary law reflects the culturalist and anthropological perspective of 'law'. This is the view that sees 'law' as self-contained systems of social rules and processes which are valid in their own right, whether or not they are generated from an institutional authority.<sup>18</sup> This contrasts with the positivistic conception of 'law' generally adopted in NZ, which tends to see law as inherently linked to authoritative state institutions. This particular state-oriented, positivist view would struggle with the notion that an indigenous people with a decentralised social system based primarily on core values could be based on anything recognisable as 'law'. Despite this view, which sees Māori custom as more appropriately described as 'lore' and not 'law', I have specifically chosen to employ the term Māori customary 'law' within this dissertation in the wider sense as law which does not have to be measured against Eurocentric ideas and is not dependent on state recognition for its validity.<sup>19</sup>

In identifying Māori customary law in legislation I adopt this broad notion of custom. I focus on Māori conceptions within legislation that encompass those practices, processes, values, and cultural norms that structure behaviour and govern the Māori way of life.

### **How can Māori Customary Law Interact with State Law?**

Statutory recognition is one of the primary means by which aspects of Māori customary law can be imported into the dominant legal system of NZ. To contextualise the relevance of statutory incorporation, it is important to recognise, there are also a number of other ways that Māori customary law can interact with the state legal system.

One mechanism through which Māori customary law can be recognised is through the common law. The English common law has long accepted the principle that the right of prior occupants

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<sup>17</sup> This translates as reciprocity.

<sup>18</sup> Boast, R "Māori Customary Law and Land Tenure" in Richard Boast et al (eds), *Māori Land Law* (Lexis Nexis, 2004) 21, 23-24.

<sup>19</sup> Note that a similar view is adopted by Williams, D V, "Indigenous Customary Rights and the Constitution of Aotearoa New Zealand" (2006) 14 *Waikato Law Review* 120, 120.

of a settled colony to follow customary law survives the assumption of sovereignty by Britain.<sup>20</sup> This presumption of continuity could explain the English Laws Act 1858 which states that English law is part of the law of NZ with effect from 1840 only "so far as applicable to the circumstances of New Zealand". The case of *Campbell v Hall*<sup>21</sup> is typically associated, at least in the instance of settled colonies, with the recognition of this continuity doctrine.<sup>22</sup> It is authority for the propositions that: 1) the inhabitants of a newly-acquired colony become British subjects immediately; 2) the laws of the newly-acquired territory remain in force until altered by the Crown; and 3) all inhabitants are subject to the legislative government of parliament.<sup>23</sup> Māori customary law and norms can thus still be regarded as a source of law enforceable in the courts provided that certain tests are met.<sup>24</sup> These requirements for recognition are set out in *Halsbury*, which states: To be valid, a custom must have four essential attributes: (1) it must be immemorial; (2) it must be reasonable; (3) it must be certain and (4) it must be continued without interruption since its immemorial origin.<sup>25</sup>

There do not seem to be any clear limits as to the customs that could be recognised in this way.<sup>26</sup> In NZ, however, the primary expression of Māori customary law accepted through this common law route has been in the domain of proprietary rights.<sup>27</sup> These rights have been manifested in the doctrines of native and aboriginal title.<sup>28</sup> Although the tests required by the common law are

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<sup>20</sup> Graham, D *The Legal Reality of Māori Customary Rights for Māori* (Treaty of Waitangi Research Unit, Victoria University of Wellington, 2001) 4.

<sup>21</sup> (1774) 98 ER 848.

<sup>22</sup> McHugh, P *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, 1991) 85.

<sup>23</sup> *Ibid.*

<sup>24</sup> Boast, n18, 30.

<sup>25</sup> See 12 *Halsbury's Laws of England 4<sup>th</sup> Ed*, para 406.

<sup>26</sup> For example, instances where custom has been recognised by the common law overseas have been in respect of distinctive forms of land tenure, special rules of inheritance, rights to use the common law or the seashore for particular purposes, rights of way, hunting, fishing and foraging rights, and rights to hold a market: see The Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws: Summary Report* (Australian Government Publishing Service, 1986), 59.

<sup>27</sup> See discussion in *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 at para 28.

<sup>28</sup> See Boast, n18, 31 who notes that the Court of Appeal in NZ in the case of *Re Landon & Whittaker Claims Act 1861*(1871) 2 NZCA 41 at 49 stated that "The Crown is bound both by the common law of England and its own solemn engagements, to a full recognition of the Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it".

difficult to meet, this path is still open as a valid means by which Māori customary norms can be recognised in the state legal system.

Māori customary law can also enter the legal system through judicial discretion. One type of judicial discretion is statutory discretion. This is where judges are given the opportunity in legislation to take into account certain elements of Māori customary law or society. Statutory discretion is evident in areas of law such as sentencing and in family protection claims. For example, s8(i) Sentencing Act 2002 states that in sentencing, or otherwise dealing with an offender, the court must take into account the offender's personal, family, *whānau*, community, and cultural background. This section, in appropriate circumstances, would therefore allow a court to consider Māori cultural beliefs and customary law when sentencing.

Another way that Māori customary law can be recognised within the legal system is through non-statutory discretion. If there is an ambiguity in the law judges may have the discretion to apply certain rules of interpretation. These rules could favour an interpretation consistent with Māori customary law. For example, in the *Ngāti Apa* case, the court adopted the interpretive principle that customary property rights could not be overridden by a 'side wind' or by a general statutory provision, but instead required clear and express statutory extinguishment.<sup>29</sup> Another example is the case of *Huakina Development Trust v Waikato Valley Authority*,<sup>30</sup> where Chilwell J took into account the Treaty of Waitangi as an aid to interpretation, when construing the term 'the public interest', despite there being no statutory reference to the Treaty in the relevant provisions.<sup>31</sup> He stated:

There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is

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<sup>29</sup> *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 at 154.

<sup>30</sup> [1987] 2 NZLR 188, 210.

<sup>31</sup> Note that this is despite the decision in *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308 that made it clear that the Treaty of Waitangi is not part of the domestic law save to the extent that parliament has provided.

to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.<sup>32</sup>

Although these types of interpretive principles do not embody any specific Māori customary practice or value, they can be used to favour and facilitate the recognition of customary law.

There are thus a number of ways that Māori customary law is recognised within the state legal system. This recognition, however, is not necessary for Māori customary law to exist and play a relevant and meaningful role in people's lives. Māori customary law can also interact with the state legal system by operating outside or in conjunction with it. There are Māori customary values and norms, very much alive today, which play a valued role in Māori society. These customs are particularly applied in controlled environments such as the *marae*,<sup>33</sup> in *hui*,<sup>34</sup> or in people's homes.<sup>35</sup> They are also commonly employed in relation to the management of natural resources. For example, the practice of *rāhui*, a temporary ritual prohibition, where *tapu*<sup>36</sup> is placed over an area or activity for conservation purposes or because the area has been contaminated by death, is still done to this day.<sup>37</sup> There are thus many Māori whose activities are regulated and guided by the body of Māori customary law that exists outside the state legal system.

Despite these different ways in which state and custom can interact, under the current constitutional arrangements the operation and recognition of custom is subordinate to the overarching regulation of state law and Acts of Parliament. This is because in the orthodox hierarchy of sources of law in the NZ state legal system, statutes trump other sources of law. They may provide alternative rules, and custom must be recognised within the state courts to be considered

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<sup>32</sup> *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210.

<sup>33</sup> A complex with a ceremonial courtyard.

<sup>34</sup> Meetings or congregations.

<sup>35</sup> NZ Law Commission, n7, 27.

<sup>36</sup> This signifies sacredness or a ritual prohibition.

<sup>37</sup> The generic definition of the Māori customary concept of *rāhui* is a “means of prohibiting a specific human activity from occurring or from continuing” and is similar to the Pākehā concept of a ban: see Mead, n10, 168.

an enforceable source of law. The ability of Māori to exercise customary law is thus limited to areas of life not controlled by the state legal system and its extensive legislative provisions.

According to prominent Māori lawyers, such as Ani Mikaere and Moana Jackson, these constitutional arrangements are inappropriate. Ani Mikaere asserts, for example, that *tikanga* Māori is the supreme law in Aotearoa and therefore all other law should be negotiated with reference to *tikanga*.<sup>38</sup> Accordingly, Mikaere calls for a change to NZ's current constitutional arrangements and for *tikanga* Māori to resume its rightful status as the first law of Aotearoa.<sup>39</sup> Taiaiake Alfred<sup>40</sup> similarly writes "Indigenous leaders who engage in arguments framed by a Western liberal paradigm cannot hope to protect the integrity of their nations".<sup>41</sup>

In accordance with this line of argument, this dissertation may not be addressing the correct issue. Instead, a more important discussion would be how the current constitutional arrangements in NZ could be re-negotiated so that Māori customary law can be recognised as being valid in its own right and not subordinate to the dominant legal system. This sentiment is supported by Chris Cunneen and Melanie Schwartz, in their paper concerning the recognition of Aboriginal customary law in Australia.<sup>42</sup> They argue that instead of having subsidiary references to custom within the general law, it is more important for Aboriginal people to establish a general right to law and governance.<sup>43</sup> On this view, the imperative discussion is thus one which focuses on the re-negotiation of a suitable political relationship between the indigenous people and the state. The question, posed by Moana Jackson is: how can the constitutional framework

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<sup>38</sup> See Mikaere, A "How will the future generations judge us? Some thoughts on the relationship between Crown law and *tikanga* Māori" (Paper presented at the Ma te Rango te Waka ka Rere: Exploring a Kaupapa Māori Organisational Framework, Te Wānanga o Raukawa, Otaki, 2006) where she states that "We need to be clear and unapologetic about this: in this country, *tikanga* is 'the law'. What the Crown currently refers to as 'the law' is merely the illegitimate product of its abuse of *kāwanatanga*."

<sup>39</sup> Mikaere, A "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* (Oxford University Press, 2005) 334, 331.

<sup>40</sup> Professor at the University of Victoria British Columbia.

<sup>41</sup> Alfred, T *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford University Press, 1999) 40.

<sup>42</sup> Cunneen, C and Schwartz, M "Customary law, human rights and international law: some conceptual issues" in *Aboriginal Customary Laws: Background Paper 11* (Law Reform Commission of Western Australia, 2005).

<sup>43</sup> *Ibid*, 430.

recognise the equally legitimate sovereign rights of Māori and the Crown to exercise governance?<sup>44</sup>

Although I think this is an important issue and an important discussion to have, the fact is Māori customary law is being incorporated into legislation.<sup>45</sup> I thus contend there is merit in a thorough consideration and critique of the consequences and appropriateness of this legislative inclusion whether or not larger constitutional developments might also take place.

There are therefore a number of ways that custom can interact with the state legal system. Although these ways may not be ideal for some, it is the constitutional structure under which NZ currently operates. Because legislation is at the top of the hierarchy within this arrangement, this dissertation focuses on the interplay between Māori customary law and statute. It is concerned with a weak form of legal pluralism in which state law incorporates, controls and defines the parameters of the recognition of Māori customary law, and with whether this is appropriate.<sup>46</sup>

### **The Historical Recognition of Custom by the Law**

Although there are a number of different ways Māori customary law can interact with the state legal system, since 1840 the system has varied in its treatment of custom, and has not always looked upon its recognition favourably.

At the very beginning of the Colonial era the existence of a Māori legal system was recognised at the highest level. In 1840 the British Minister instructed Governor Hobson that:

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<sup>44</sup> Jackson, M "Where does Sovereignty Lie?" in Colin James (ed), *Building the Constitution* (Institute of Policy Studies, Victoria University of Wellington, 2000) 197.

<sup>45</sup> Durie, E T "Treaties and the Common Law as a Source of Indigenous Rights" (Paper presented at the 9th Commonwealth Law Conference, April 1990).

<sup>46</sup> See Griffiths, A "Customary Law in a Transnational World: Legal Pluralism Revisited " (Paper presented at the Conference on Customary Law in Polynesia, 12 October 2004) for a discussion on legal pluralism. Note that the term legal pluralism in its most basic meaning refers to a situation where there is more than one legal system operating in a single geographic area.



...[Māori] are not wanderers over an extended surface, in search of a precarious subsistence; nor tribes of hunters, or of herdsmen; but a people among whom the arts of government have made some progress: who have established by their own customs a division and appropriation of the soil... with usages having the character and authority of law.<sup>47</sup>

Although it was acknowledged that Māori customary law existed, the issue that arose after the signing of the Treaty of Waitangi in 1840 was how this law was to interact with English law. The first charter of the colony in 1840 erected courts purporting to have jurisdiction over all inhabitants of the country, both Māori and Pākehā. This charter also established the executive and legislative authorities for the colony.<sup>48</sup> Initially, however, the colonial state lacked the resources to impose law on Māori. As a result, there was a large degree of uncertainty and inconsistency with the application of English law.<sup>49</sup> Essentially Māori continued to live in accordance with their own laws and there was an uneasy tension between the two conflicting legal systems.

In response, the Colonial legislators, for pragmatic reasons, initially displayed a willingness to give effect to Māori law. As Joseph points out:

Imposing British law onto Māori hardly made sense given that the Māori did not speak English, did not understand the norms and values underlying British law, and to translate English laws into Māori would have been very difficult. Even if it was done the laws would be singularly inappropriate to the conditions in which nearly all Māori were living.<sup>50</sup>

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<sup>47</sup> Russell to Hobson 9 December 1840. *Parliamentary Papers*, NZ, 1841, No. 311, p.24 cited in Benton, R A, "The Importance of Words: An Introduction" (2003) 8 *Te Matapumunga: A Compendium of References to Concepts of Māori Customary Law* 3, 4.

<sup>48</sup> McHugh, n22, 90.

<sup>49</sup> For example the Colonial officials were initially confused about whether they should intervene in customary feuds and conflicts. Further when they did attempt to impose their laws they often were not in a position to be able to do so. For example in 1843 members of the Ngāti Toa *ivi* burned down a small hut made by surveyors because they believed it was built on their land. In response the Nelson justices of the peace attempted to arrest members of the *ivi*. Ngāti Toa, however, easily overpowered the armed posse of Nelson settlers. Further, a number of the Pākehā survivors were later massacred as *utu*, or reciprocity, for the death of one of the Māori wives during the exchange. Thus although Pākehā officials attempted to enforce their own law on Māori, in this situation it was ultimately Māori law that was enforced on the Pākehā. See Boast, R "Māori and the Law, 1840-2000" in Peter Spiller, Jeremy Finn and Richard Boast (eds), *A New Zealand Legal History* (Lexis Nexis, 2001) 123, 138.

<sup>50</sup> Joseph, R A cited in The NZ Law Commission, n7, 18.

Māori were initially largely left to their own devices and Māori customary law was incorporated, in varying forms, into legislation. Examples include the Native Exemption Ordinance 1844,<sup>51</sup> the Resident Magistrates Courts Ordinance 1846,<sup>52</sup> the Resident Magistrates Act 1867,<sup>53</sup> and section 71 of the Constitution Act 1852.<sup>54</sup>

Despite this early acceptance of Māori customary law, it was clearly envisaged this recognition would only be temporary.<sup>55</sup> The ultimate goal was for Māori law to be eclipsed as it was believed by the settlers that English institutions were innately superior and it was in the best interests of Māori to assimilate.<sup>56</sup> It was therefore not long before the colonial system, using the law as one of its primary instruments, commenced a prolonged attack on Māori customary law. What followed was a convoluted legal history in which Māori customary law was displaced in several different ways and with varying rapidity throughout the country.

There were several routes, both statutory and judicial, through which this occurred. Statutory displacement occurred through means such as overt suppression, for example the Tohunga Suppression Act 1907 that criminalised *tobunga* practices.<sup>57</sup> Customary law was also suppressed by legislation through its initial recognition only for it to be extinguished or re-interpreted.<sup>58</sup> An explicit example can be seen in the workings of the Native Land Court where, although the court

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<sup>51</sup> This ordinance made a number of concessions. It provided that in relation to crimes between Māori, British intervention was dependent on Māori request. It also allowed convicted Māori thieves to pay four times the value of goods stolen in lieu of other punishment. It also provided that no Māori would be imprisoned for a civil offence: see The NZ Law Commission, n7, 19.

<sup>52</sup> The Ordinance provided Resident Magistrates with summary jurisdiction over disputes between Māori and non-Māori. In disputes involving only Māori, the Resident Magistrate was to be assisted by two Māori chiefs appointed as Native Assessors without being constrained by strict legal evidence. In addition, the decision in each case was to be made by the two Assessors, with intervention by the Magistrate only in cases of disagreement. See *ibid*, 19-20.

<sup>53</sup> This Act provided that a Māori summarily convicted of theft or receiving might pay four times the value of the goods in lieu of sentence, thus maintaining official recognition of the Māori custom of *muru*. See The NZ Law Commission, n7, 19-20.

<sup>54</sup> This section provided that areas could be designated in which Māori custom was to apply between *tangata* Māori. This section (s71), however, was never used: Frame, A, "Colonising Attitudes Towards Māori Custom" (1981) *New Zealand Law Journal* 105, 107.

<sup>55</sup> *Ibid*, 106.

<sup>56</sup> Mikaere, n39, 335.

<sup>57</sup> *Tobunga* were skilled spiritual leaders, priests or experts in a particular area. For example, one function often performed by a *tobunga* could be to 'bless' a house by performing prayers and cleansing the house of any evil influences: see Mead, n10, 330.

<sup>58</sup> The NZ Law Commission, n7, 15-24.

claimed to be granting titles in accordance with Māori custom, it was in reality facilitating the individualisation and fragmentation of Māori land.<sup>59</sup> This reinterpretation alienated Māori from their land and effectively removed the main resource to which Māori custom law applied. Another legislative means of displacement was through extensive statutory regimes that extended to all citizens, such as the general criminal code.<sup>60</sup> This sort of comprehensive regime worked to supplant the distinct rules of Māori law. There were therefore a number of diverse ways in which statutory law, geared to assimilate Māori, had the effect of displacing Māori customary law.

Māori customary law was also adversely affected through judicial treatment. Although judicial opinions varied, there was a pervasive line of argument that went as far as to deny the existence of Māori customary law. The most explicit instance of this was in the infamous 1877 case of *Wi Parata v The Bishop of Wellington*<sup>61</sup> where Chief Justice Prendergast held that Māori were savage barbarians with no settled law and no organised system of governance from which laws could emanate.<sup>62</sup> Although the *Wi Parata* reasoning was rejected by the Privy Council in 1901<sup>63</sup> it continued to permeate legal reasoning in NZ for decades.<sup>64</sup>

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<sup>59</sup> See; The NZ Law Commission, n7, 25 that notes that at one point land legislation only allowed a maximum of 10 owners. This is contrary to the customary communal ownership property system employed by Māori. Also see Williams, D V *Te Kooti Tango Whenua: The Native Land Court 1865-1909* (Huia Publishers, 1999) 51-62 who notes that, because of the land court system, today there is no customary Māori land of significance anywhere in NZ. There are only a few remote rocks and tiny islands that avoided title investigation.

<sup>60</sup> In 1883, a Bill codifying the criminal law was introduced to NZ. The Bill was passed by the Legislative Council but was held up in the Lower House. The same fate befell several subsequent Bills. In 1883 the Criminal Code Act was finally adopted. The present code is contained in the Crimes Act 1961. See McLintock, A H, *An Encyclopaedia of New Zealand* (1966) <<http://www.teara.govt.nz/1966/C/CriminalLaw/CriminalLaw/en>> accessed 21st September 2009.

<sup>61</sup> (1877) 3 NZ Jur NS (SC) 72.

<sup>62</sup> Note that this decision was made despite relevant statutory provisions making explicit reference to customary law. See s4 of the Native Rights Act 1865 that states: Every title to or interest in land over which the Native Title shall not have been extinguished shall be determined according to the Ancient Custom and Usage of the Māori people so far as the same can be ascertained.

<sup>63</sup> This was in the case of *Nireaha Tamaki v Baker* (1901) NZPCC 371, at 382, where their Lordships rejected the view of Sir James Prendergast by observing that “It was said in (the *Wi Parata* Case) which was followed by the Court of Appeal in this case, that there is no customary law of the Māoris of which the Courts of law can take cognisance. Their Lordships think that this argument goes too far and that it is rather late in the day for such an argument to be addressed to a New Zealand Court’.

<sup>64</sup> The Privy Council’s reasoning however was later ignored in the case of *Re Ninety-Mile Beach* [1963] NZLR 461.

The effect of the multi-faceted attack by the legal system, designed to colonise and ‘civilize’ Māori, ultimately shattered the Māori world.<sup>65</sup> As Ani Mikaere states “With respect to our *tikanga*, that which had formerly operated successfully as a comprehensive and self-contained system of law was reduced to what Moana Jackson has described as ‘a subordinate place of ceremony’”.<sup>66</sup>

Despite the extensive and devastating ramifications, however, Māori customary law continues to exist and Māori are undergoing a process of revitalising their language and culture.<sup>67</sup> This has been reflected in the state legal system as it has increasingly started to recognise Māori interests and customary law. Since the 1970s, both the Labour and National governments have enacted legislation that refers to the principles of the Treaty of Waitangi, they have incorporated components of Māori customary law into legislation, and the courts have reintroduced the doctrine of native title into the common law of Aotearoa.<sup>68</sup>

### **Statutory Recognition of Māori Customary Law**

At present, there are thus numerous references within legislation to Māori concerns, issues and considerations.<sup>69</sup> This dissertation is only concerned with the statutory incorporation of Māori customary law. There are two primary ways in which aspects of Māori customary law can be incorporated into legislation. Implicit incorporation is when Māori customary law is not directly referred to but one or more of its fundamental tenets or ideas are reflected in a particular statute. For example, it could be said the Māori customary view that it is wrong to take the life of another human being is implicitly recognised in the Crimes Act 1961, as homicide is made

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<sup>65</sup> Ruru, J "The Māori Encounter with Aotearoa: New Zealand's Legal System" in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 111, 118.

<sup>66</sup> Mikaere, n38.

<sup>67</sup> For example, this is evident in the Kohanga Reo movement, where Māori set up their own language nests for pre-schoolers.

<sup>68</sup> See Ruru, n65, 111.

<sup>69</sup> For example, there are policies to advance Māori socio-economic interests, there is the settlement of historical grievances and there are also statutes aimed at cultural advancement and survival.

illegal.<sup>70</sup> In this instance, although there is no mention of Māori customary law or its concepts, part of its substance is recognised within legislation. Māori customary law can also be recognised in legislation through ‘explicit’ incorporation. This is when legislation has an overt Māori focus and it is relatively clear that the statute is dealing with an issue involving Māori customary law.<sup>71</sup> For example, section 7 of the Resource Management Act 1991 requires decision-makers to have particular regard to *kaitiakitanga*.<sup>72</sup> This concept is intimately linked to the intertwining principles of Māori customary law and is a clear example of explicit incorporation.<sup>73</sup> Not to diminish the significance of implicit recognition but, in this dissertation, I have chosen to focus solely on explicit instances of statutory incorporation.

This chapter has shown that this dissertation will be employing a broad conception of Māori customary law. It illustrated how customary law can interact with and be recognised by the state legal system in a number of different ways. Its historical treatment by the law, however, has fluctuated, ranging from initial recognition of custom, to its widespread suppression, to an increasing recognition and acknowledgement within legislation in recent times. Given this increasing legislative recognition, this dissertation is going to examine the positive and negative aspects of the recognition of custom within legislation.

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<sup>70</sup> For example see s158-180 of the Crimes Act 1961.

<sup>71</sup> It should be noted that explicit recognition of Māori customary law can take many forms.

<sup>72</sup> Note that in section 2 of the Resource Management Act 1991 *kaitiakitanga* is defined as being ‘the exercise of guardianship by the *tangata whenua* of an area in accordance with *tikanga* Māori in relation to natural and physical resources; and includes the ethic of stewardship’.

<sup>73</sup> For example, not only does it tie into notions such as *manaakitanga*, *mana* and *tapu*, but it also relates to the Māori belief that it is their responsibility to treat the *atua* (gods), which are embodied within the natural world and are their eponymous ancestors, with respect.

## CHAPTER TWO: THE POSITIVE AND NEGATIVE ASPECTS OF INCORPORATING MĀORI CUSTOMARY LAW INTO LEGISLATION

This chapter addresses some of the positive and negative effects of integrating Māori customary law into statute. Whether one considers these to be ‘positive’ or ‘negative’ largely depends on one’s perspective. What many Māori may consider to be a drawback may be seen by the majority of Pākehā as an advantage. Although this chapter attempts to canvas an array of perspectives, it tends to focus on whether statutory incorporation of Māori customary law is good for Māori. It is also notable that statutory recognition of Māori customary law can occur in a number of different forms. The strength of some of the arguments made in this chapter can therefore fluctuate depending on the form of incorporation employed. A number of these positive and negative aspects will be further examined in Chapter Three, which looks at the advantages and disadvantages of specific forms of legislative incorporation.

### **The Perpetuation of the Colonial Legal Status Quo**

One of the effects of incorporating Māori customary law into legislation is that it perpetuates and confirms the supremacy of the colonial legal system. It reaffirms the rules of recognition of this system, namely, that there are only two streams of law which are directly recognisable and enforceable in the courts of NZ: those which have been incorporated into legislation and those which derive from the common law.<sup>74</sup>

It further reinforces the notion of parliamentary sovereignty, a fundamental tenet of the dominant NZ legal system. In the *NZ Māori Council* case Somers J, in passing, unequivocally

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<sup>74</sup> See McHugh, n22, 11. Also note that the term ‘rule of recognition’ derives from Hart’s model of a legal system. Hart’s model consists of a union of both primary and secondary rules. Primary rules are those pertaining to permissible, mandatory or prohibited conduct of ordinary citizens or organisations, and thus perform such functions as denoting one’s obligations or conferring power. Secondary rules however indicate how the primary rules are recognised, how they are changed and how disputes about them are adjudicated. The ‘rules of recognition’ are therefore secondary rules of the state legal system that indicate what will constitute recognisable ‘law’ within this system. See Hart, H L *The Concept of Law* (Clarendon Press, 1961).

stated that ‘Sovereignty in New Zealand resides in Parliament’.<sup>75</sup> This means that, knowing no subjection to any other body, parliament has the legally unchallengeable, supreme and unlimited power to make, declare, enforce and administer the law and policy under which a political society lives.<sup>76</sup> This view of absolute parliamentary sovereignty, deriving from British constitutional theory, has been the preferred view within NZ’s state legal culture for 150 years.<sup>77</sup> The incorporation of Māori customary law into legislation by parliament is an affirmation of parliament’s sovereignty in NZ. Its insertion perpetuates the dominance of the colonial legal system and its tenets, as well as reinforcing a weak form of legal pluralism whereby legal recognition of Māori customary law is subject to the rules of recognition of the state legal system.

Whether this is a positive or negative aspect of incorporation, however, depends on one’s view of this system. It may be seen as a good thing by those who favour the current constitutional order. Others may see it as undesirable, contending a stronger form of legal pluralism should be adopted in NZ and the current constitutional arrangements should be renegotiated so Māori customary law is valid in its own right.<sup>78</sup>

Ani Mikaere, for example, opposes the incorporation of *tikanga* concepts into legislation on the basis that it legitimates the coloniser’s imposed law.<sup>79</sup> Her argument is that to accept the incorporation of Māori customary law into legislation is, in a sense, to relinquish the Māori claim for *tinorangatiranga*.<sup>80</sup> Moana Jackson is similarly critical of the state legal system and contends that incorporating Māori legal and philosophical concepts into the law is part of the continuing

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<sup>75</sup> *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at 640.

<sup>76</sup> See Sharp, *A Justice and the Māori: The Philosophy and Practice of Māori Claims in New Zealand since the 1970s* (Second ed, Oxford University Press, 1997) 266.

<sup>77</sup> See Dawson, n3, 61.

<sup>78</sup> Note that this is the view of the rejectionists discussed in Chapter One. However, their argument is framed directly in relation to the debate concerning legislative incorporation of Māori customary law.

<sup>79</sup> For example see Mikaere, n38, where she questions the proposed Waka Umanga structures for Māori entities.

<sup>80</sup> See Mikaere, n38 as well as Mikaere, n39, 330. In this latter work she states that “any concessions that are made to Māori aspirations for tino rangatiranga and the recognition of tikanga are... envisaged as occurring within the framework of Crown sovereignty. As such, they represent the false generosity of the oppressor...”.

story of colonisation. He believes “its presentation as an enlightened recognition of Māori rights are merely further blows in that dreadful attack to which colonization subjects the indigenous soul”.<sup>81</sup> On his view incorporation “captures, redefines, and uses Māori concepts to freeze Māori cultural and political expression within parameters acceptable to the state” and thereby imprisons customary law within a perception of its worth that is determined from the outside.<sup>82</sup> Accordingly, working within the legal structure, and thereby consolidating its existence and superiority, is a negative aspect of statutory incorporation.

There is, however, an alternative argument that occupies a middle ground between those who favour incorporation and preservation of the current constitutional order and those who reject it. This is the view that small-scale constitutional changes, in the form of subtle alterations in the sources of state recognised law, may make it more likely larger constitutional changes will occur in the future. The incorporation of Māori customary law into legislation could therefore, depending on form, be perceived positively as it may act as a catalyst for larger changes. For example, if the public see there are not disastrous consequences from giving Māori the authority to make decisions about resource use based on their own customs, it may pave the way for a greater recognition of Māori customary law as a valid source of law.<sup>83</sup> This gradualist position would see the incorporation of custom as being conducive to creating an intellectual and political climate whereby larger positive change ultimately becomes possible.

There is thus a spectrum of views as to whether the perpetuation of the current legal system by incorporating Māori customary law into legislation is positive or negative. Although each

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<sup>81</sup> Jackson, M "Justice and Political Power: Reasserting Māori Legal Processes" in Kayleen M Hazelhurst (ed), *Legal Pluralism and the Colonial Legacy* (Ashbury Publishing Ltd, 1995) 244, 254.

<sup>82</sup> Jackson, M "The Treaty and the Word: The Colonization of Māori Philosophy" in Graham Oddie and Roy Perrett (eds), *Justice, Ethics and New Zealand Society* (Oxford University Press, 1992) 1, 8.

<sup>83</sup> For example, the Tūwharetoa and Taupō District Council co-management agreement that was created under 36B to 36E of the Resource Management Act 1991 gives Māori joint decision-making powers over resource consents and plan changes that affect multiply owned Māori land see: Taupō District Council, *Ngāti Tūwharetoa Joint Management Agreement* (2009) <<http://www.taupodc.govt.nz/PoliciesPlans/Adopted-Policies-and-Plans-A-Z/Ngati-Tuwharetoa-Joint-Management-Agreement/>> accessed 13 September 2009. If this agreement is successful it may pave the way to greater recognition of Māori authority in decision-making roles and ultimately lead to an acceptance of Māori environmental customs and ethics.



position can be supported by convincing arguments, the solution proposed by the rejectionists, that would either require constitutional renegotiation that recognises Māori sovereignty or give equal prominence to Māori customary law, faces a number of practical barriers. This includes the desire of many NZs to maintain the comprehensiveness of the state legal system.<sup>84</sup> Also, Māori are a minority in NZ,<sup>85</sup> are geographically and often socially integrated with the rest of society,<sup>86</sup> and official participants within the state legal system are likely to affirm the system's validity.<sup>87</sup> Further, the notions of parliamentary sovereignty (discussed above) and legal positivism (which tends to identify law with rules issued by authoritative state institutions), are deeply rooted in the NZ legal system, and work to resist the re-recognition of Māori customary law as an official source of law.<sup>88</sup> All of these factors mean large-scale constitutional change is only likely if it occurs through parliamentary concession or a revolution. This is not to claim that fundamental constitutional change is impossible and should not be sought after, just that it is likely to face major opposition and societal barriers.<sup>89</sup> Therefore, although the perpetuation of the colonial legal status quo may be a drawback to those who reject the system, the current political and social climate is such that, however unjust, a fundamental change to this

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<sup>84</sup> For example see Williams, D V "Unique Treaty-Based Relationships Remain Elusive" in Michael Belgrave, Merata Kawharu and David Williams (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, 2005) 369, 370 who states that "Pākehā power-holders are unwilling to debate, let alone accommodate, tangata whenua aspirations if they perceive that this will lead to a divided national sovereign, separatism, or parallel justice systems. They almost always commit firmly to a single national sovereignty with parliament as sovereign in which we are all New Zealand citizens under one law for all."

<sup>85</sup> In the 2006 census 17.7 percent of people usually in NZ were of Māori descent: see Statistics New Zealand, *Quick Stats About Māori, Māori Descent and Iwi* (2006)

<<http://www.stats.govt.nz/Census/2006CensusHomePage/quickstats-about-a-subject/quickstats-about-Māori/Māori-descent-and-iwi-ko-nga-kawai-whakaheke-Māori-me-nga-iwi.aspx>> accessed 11 August 2008.

<sup>86</sup> NZ is a geographically small country, unlike in Canada and the US where extensive reserves can be set aside where the indigenous peoples are generally allowed to apply their own customary law. See Dawson, n3, 59 who recognises that today roughly 90% of Māori live in cities or towns, and mostly live outside their traditional tribal areas, no longer governed directly in most of their life by the social mechanisms that are so central to the operation of customary law. Māori are thus to a large extent urbanised and have also heavily intermarried with the Pākehā population.

<sup>87</sup> For example the courts are under an obligation to only apply law which their 'rules of recognition' acknowledge.

<sup>88</sup> See Dawson, n3, 60-61.

<sup>89</sup> Note that even Ani Mikaere recognises that acknowledging tikanga Māori as the first law in Aotearoa, with respect to which all other law must be negotiated, is likely to provoke cautionary admonitions as to what is 'realistic' in contemporary contexts. She however argues that although difficult, Māori have an obligation to strive for this and to uphold tikanga for future generations: see Mikaere, n39, 343.

constitutional legal structure is unlikely to be imminent.<sup>90</sup> Given this, the question then becomes: is some recognition better than nothing? Is it better to keep Māori customary law out of the state legal system regardless of how remote constitutional change may be, or alternatively, is it better for Māori customary law to gain some recognition and enforceability within the state legal system and perhaps incrementally move us towards larger constitutional reform? There is no simple answer to this issue. However, further consideration of the positives and negatives of the process of incorporation will aid this debate.

### **Elevation up the Hierarchy**

If it is accepted that it is advantageous for Māori customary law to operate within the state legal system, one positive effect of statutory incorporation is that it elevates customary law in the hierarchy of accepted sources of law. In the state legal structure, statutes trump the common law. This supremacy, which is paradoxically a rule of the common law,<sup>91</sup> means that statutory incorporation would raise Māori customary law from either having limited common law recognition or lying outside the state legal structure. This elevation of Māori customary law to the highest tier of recognition can be considered one of the positive effects of legislative incorporation as it generally makes the custom fully enforceable in the courts.

### **The Flexibility of Statutes**

Legislation has extremely flexible capabilities. Provided a bill goes through the proper processes, the notion of parliamentary sovereignty means legislation can be enacted on any matter and in any form.<sup>92</sup> This means statutes can be used creatively and in a manner that is favourable or

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<sup>90</sup> Note that Moana Jackson conversely contends that ultimately a fundamental constitutional change will occur as Māori 'are seeking to reclaim the validity of our own institutions, the specifics of our own faith, and the truths of our own history. That process will not only nourish once more the Māori soul, it will also eventually undermine the conceptual framework of the Pākehā work and the oppression which has flowed from it' (see Jackson, M, "Changing Realities: Unchanging Truths" (1994) 10 *Australian Journal of Law and Society* 115, 10).

<sup>91</sup> See McHugh, n22, 69.

<sup>92</sup> Note that there have been some suggestions by people such as Lord Cooke that there are some restrictions on parliamentary sovereignty. Lord Cooke expressed the opinion that there may be some rights which are so fundamental, such as freedom from torture, that not even Parliament could abrogate them (see *Taylor v NZ Poultry*

acceptable to Māori. For example, legislation could be extremely broad and recognise Māori customary law as a valid source of law, it could recognise Māori customary authority or it could even incorporate aspects of customary law not yet recognised by the common law. There are numerous possibilities. An example of the creative capacity of legislation is the innovative mechanisms used to recognise the customary association of Ngai Tahu with their ancestral mountain Aoraki/Mt Cook.<sup>93</sup> Among a number of novel and creative legislative devices, a ‘Tōpuni’ was created in which a cloak of Ngai Tahu values and associations was thrown by the law over Aoraki.<sup>94</sup> These values now have to be recognised in the relevant conservation management strategies, the conservation and national park management plans,<sup>95</sup> and be taken into account by certain statutory bodies, such as the NZ Conservation Authority.<sup>96</sup>

Although legislation can be used imaginatively to advance the recognition of Māori interests, the converse of this is that the flexibility of statutes can also be used to change, override and restrict the operation of Māori customary law. Legislation could take a very narrow view of custom, such as in the Foreshore and Seabed Act 2004 where the recognition of Māori customary rights to the foreshore and seabed became not only subject to some extremely strict legal tests, but could only support a customary or territorial rights order. Ultimately the form legislation takes, and the way its flexible capabilities are utilized, is determined by parliament. Its authority can therefore be viewed as an advantage or disadvantage, depending on the approach it takes to the incorporation of customary law.

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*Board* [1984] 1 NZLR 394 (CA) at 398, in the context of statutory limits placed on the privilege against self-incrimination).

<sup>93</sup> See in general the Ngai Tahu Claims Settlement Act 1998.

<sup>94</sup> See sections 237-253 and the associated Schedules in the Ngai Tahu Claims Settlement Act 1998. Other creative mechanisms used are ‘Acknowledgements’ (see Schedule 14 of the Ngāi Tahu Claims Settlement Act 1998) in which Ngai Tahu sets out their position and association with a number of environmental features and the Crown then undertakes to recognise and promote these within administrative and resource management regimes.

<sup>95</sup> See section 243 of the Ngai Tahu Claims Settlement Act 1998.

<sup>96</sup> See sections 240, 244 of the Ngai Tahu Claims Settlement Act 1998.

## **The Tyranny of the Parliamentary Process**

In the NZ state legal system, laws are created through the parliamentary process. This process therefore directly influences the form and degree of recognition of Māori customary law that is found in legislation. NZ operates a democratic system of government in which members of parliament are chosen in free and fair elections every three years. These members, which make up the House of Representatives, have the power to make legislative amendments or create new law by majority vote in the House.<sup>97</sup>

The representative nature of parliament means that public opinion is extremely influential in the law-making process. The incorporation of Māori customary law into legislation is therefore largely subjugated to the dominant interests and opinions of the majority. From the perspective of the majority this is likely to be considered a good thing. For minority groups such as Māori, however, it means their interests are not always adequately and appropriately protected. The influence of the majority on the parliamentary process is therefore likely to be negative for Māori as it may prevent Māori customary law from being recognised at all or it could detrimentally influence the form this recognition takes. It could result in recognition being piecemeal or it being carried through in a form that does not accurately reflect the Māori view of custom.

Despite the influence of the majority, the political climate from time to time is not always hostile to Māori opinion. This is because the make-up of the House of Representatives and the government is fluid, and on occasion, is significantly influenced by Māori opinion or representation. In some instances, the complexion of the government may be conducive to favourable recognition of Māori interests. For example, the Māori Party (that currently occupies five Māori seats in Parliament) is, by virtue of their confidence and supply agreement with the

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<sup>97</sup> Note that from the House of Representatives a government is formed when a party or group of parties can show that they have the confidence and support of the House. This formation can involve making agreements among several parties. For example, some may join a coalition government, whilst others may stay outside the Government but agree to support it on confidence votes. Although parliament makes laws, the government is instrumental in this process as having the confidence of the house means that they can usually gain majority agreement.

National Party, part of the present government. This arrangement is likely to mean Māori interests are more readily recognised and taken into account in the law-making process. This inter-party agreement, for instance, has already led to a review of the controversial Foreshore and Seabed Act 2004.<sup>98</sup> On other occasions, however, the structure of Parliament and the political alliances that constitute the majority in the House may not favour Māori. When the Foreshore and Seabed Act 2004 was passed under a Labour/Progressive government, the Māori Party and wider Māori opinion had very little influence on the form this legislation took.<sup>99</sup> Accordingly there is fluctuation, depending on the composition of Parliament, as to whether the parliamentary process is likely to play a positive or negative role in the incorporation of Māori customary law into legislation.

Ultimately, however, within these political and constitutional arrangements, the recognition of Māori customary law is at the whim of the parliamentary majority at the time. There is therefore something precarious about this recognition being susceptible to changing political trends.<sup>100</sup> Further, the fact that parliament can always overturn or amend even the most promising recognition of Māori customary law with the stroke of a legislative pen ultimately means Māori have limited control over the recognition of their custom within the law.<sup>101</sup> There are thus certainly disadvantages in the recognition of Māori customary law being subject to the parliamentary process.

### **Interpretation/Application of Māori Customary Law by Non-Māori Decision-Makers**

When Māori customary law is incorporated into legislation it usually becomes subject to enforcement, interpretation and application by non-Māori decision-makers, in particular the judiciary. Some negative effects may flow from this. Firstly, the decision-makers will often have

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<sup>98</sup> Note that there was widespread Māori dissent to the passing of this Act.

<sup>99</sup> Note that the Foreshore and Seabed Act 2004 was passed by a majority comprised of Labour, the Progressives and NZ First.

<sup>100</sup> It could, for example, have a negative effect on the continuity and practice of custom.

<sup>101</sup> Unless Māori become a majority.

very little understanding or background in *tikanga* Māori. This is problematic because it leaves open the possibility of misinterpretation,<sup>102</sup> or for meaning to be lost in translation, and for misunderstandings.<sup>103</sup> In the state legal system these distorted constructions run the risk of becoming codified in judicial precedent. This is a potential disadvantage for Māori because, as Justice Joe Williams has stated, “the nature of *tikanga* is such that to codify it is to kill it”.<sup>104</sup> Māori customary law does not have a tradition of strict legal precedent as it is the underlying values that are important, not necessarily the consistency of application.<sup>105</sup> Therefore, the freezing of custom in judicial precedent could change and alter unfavourably the substance of Māori customary law.

Another danger of Māori customary law being interpreted and applied by Pākehā judges is, despite any claims to neutrality, decision-makers naturally see the world according to their own upbringing and cultural experiences.<sup>106</sup> As Justice Eddie Durie puts it, because “judges are not without culture and culture pervades most things, it is difficult to see how justice can be provided in cross-cultural conflict by recourse to the courts in the usual way”.<sup>107</sup> Thus, because of a potential lack of cultural comprehension, there is the possibility that a decision may reflect a judge’s own understanding of the world or of the underlying values relevant to the interpretive

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<sup>102</sup> For example the purpose of the original Māori Land Court was to create, out of the complexities of *tikanga* Māori, a system which was simple to discern and cognisable to the English mind. However, misinterpretations were apparent. For example, the notion of *take tuku* was often wrongly translated as a right by gift and was treated as a complete transfer with no conditions or strings attached. *Tuku* was, however, an extremely complex system by which, through land transfer, relations between the transferor and transferee were maintained. Thus the Māori Court, in recognising *tikanga* under statute, simplified and misinterpreted it, froze entitlements and then removed them altogether. See Williams, J *The Māori Land Court: A Separate Legal System?* (New Zealand Centre for Public Law, 2001) 4.

<sup>103</sup> For example Eddie Durie tells of an instance where, some decades ago, a Māori elder appeared before the Māori Land Court regarding a claim of ownership to the Whanganui riverbed. He did no more than sing a song about the river. The court noted that he sang a song but had nothing to say. This illustrated a fundamental misunderstanding of the significance of the river to the man, as he was asserting ownership in his own way. He was simply declaring ownership by song and through a customary manner. See Durie, E T "Justice, Biculturalism and the Politics of Law" in Margaret Wilson and Anna Yeatman (eds), *Justice and Identity: Antipodean Practices* (Bridget Williams Books, 1995) 33, 36.

<sup>104</sup> Williams, n102, 8.

<sup>105</sup> Ibid.

<sup>106</sup> See Durie, n103, 35.

<sup>107</sup> Durie n103, 33 contends that because one culture should not be judged by the standards of another resolution of cross-cultural conflicts requires either fair negotiations with equality of bargaining power, or a bi-culturally competent adjudicatory body.

task. Alternatively, Durie recognises that, because judges are being called upon to assess the mores of a society that is largely foreign to them, there is scope for those who could profit from the situation to effectively ‘pull the wool over the judges’ eyes.<sup>108</sup> There is thus the potential for Māori to abuse the interpretation process in light of the ignorance of the decision-makers. Moreover, the state legal system generally operates in an adversarial manner. This may have the effect of exacerbating polarised positions, highlighting disagreements as to custom.

Finally, inserting Māori custom into the law naturally changes its nature, as it largely divorces the custom from its own rules of adjudication and recognition.<sup>109</sup> There are therefore many issues that arise when non-Māori institutions are ultimately given the power to apply and interpret Māori customary law. These issues will be discussed further in specific contexts in the following chapter.

### **Certainty/Consistency**

The ‘rule of law’ is an ideal that is often seen as one of the pillars upon which democracy rests.<sup>110</sup> Although its meaning is disputed, one of the propositions inherent within the notion of the rule of law is that law must be accessible and, so far as possible, intelligible, clear and predictable.<sup>111</sup> Arguably, incorporating Māori customary law into legislation can create certainty.

Statutory incorporation can be more certain than other legal mechanisms by which Māori customary law can be recognised. This positive was identified by the Law Reform Commission

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<sup>108</sup> Durie, E T "Ethics and Values" (Paper presented at the Te Oru Rangahau Māori Research and Development Conference, Massey University, 7-9 June 1998) <<http://www.knowledge-basket.co.nz/oldwaitangi/press/98massey.HTM>> accessed 22 September 2009.

<sup>109</sup> See n74 for a brief explanation of the terms ‘rules of adjudication and recognition’.

<sup>110</sup> O'Donnell, G, "Why the Rule of Law Matters" (2004) 15(4) *Journal of Democracy* 32 at 32 <[http://muse.jhu.edu/journals/journal\\_of\\_democracy/v015/15.4odonnell.html](http://muse.jhu.edu/journals/journal_of_democracy/v015/15.4odonnell.html)>.

<sup>111</sup> The European Court of Human Rights has put the point very explicitly in *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 271, §49 where they stated: "... the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case ... a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." Also see: Lord Bingham of Cornhill "The Rule of Law" (Paper presented at the Sixth Series of Lectures in Honour of Sir David Williams, University of Cambridge Centre for Public Law, 16th Nov 2006) <<http://www.cpl.law.cam.ac.uk/Media/THE%20RULE%20OF%20LAW%202006.pdf>>.

of Western Australia in their Discussion Paper on the recognition of Aboriginal Customary Law where they stated "... in the absence of legislative obligation the judicial recognition of Aboriginal customary law will only ever be on an ad hoc basis. The common law therefore cannot be expected to provide a coordinated, consistent recognition of Aboriginal customary law."<sup>112</sup> The problem identified by the Commission was that common law recognition of customary law is insufficient because it is not a consistent and clear recognition of custom. Similarly, judicial discretions are generally applied in spasmodic ways. Statutory recognition of customary law, on the other hand, depending on its form, has the ability to prevent ad hoc recognition and to provide more certainty, clearer guidelines and therefore more consistency in the application and recognition of Māori customary law.

Form, however, is vital here as the extensive codification of Māori customary law may bring about more certainty, whereas the legislative recognition of Māori authority to apply custom may not. The advantage of certainty is that it both clarifies the law and makes it more easily ascertainable by the public. This means people can know what is expected of them and the incorporation becomes a positive legal impulse that guides conduct. Although certainty and predictability are generally seen as positive qualities, in regards to Māori customary law they could have some negative effects, such as freezing custom in an undesirable form. The notion of certainty will be further examined in the following chapter where it will be discussed in reference to particular forms of incorporation

## **Equality**<sup>113</sup>

Equality is the great political issue of our time....there, men have something to die for, kill for, agitate about, be miserable about. The demand for Equality obsesses all our political thought. We are not sure what it is...but we are sure that whatever it is, we want it: and while we are prepared to look on frustration, injustice or violence with tolerance, as part of the

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<sup>112</sup> Law Reform Commission of Western Australia "Part III - Recognition of Aboriginal Customary Law" in *Aboriginal Customary Laws, Project 94: Discussion Paper* (Quality Press, 2005) 61.

<sup>113</sup> Note that some assistance on the notion of equality was derived from Abby Suszko's draft PhD chapter (in author's possession).



natural order of things, we will work ourselves up into paroxysms of righteous indignation at the bare mention of Inequality.<sup>114</sup>

Although J.R. Lucas wrote this statement thirty years ago, he aptly illustrates the social importance the concept of equality has in society.<sup>115</sup> Equality, however, is a complex notion that can be argued in a number of different ways. The recognition of Māori customary law in legislation might be considered contrary to notions of strict formal equality. Formal equality is the principle that individuals who are alike should be treated alike. Accordingly, differential treatment is only warranted when there is a relevant and justifiable difference. Some might argue distinguishing Māori customary law and Māori beliefs and interests in legislation is against this notion of equality as there is no relevant difference between Māori and the rest of NZ society. This 'one law for all' argument was espoused by Don Brash in his infamous Nationhood Speech, given in January 2004 at Orewa.<sup>116</sup> In this speech Brash admonished race-based features in legislation, as he saw them as racially dividing the nation. On this strict view of formal equality, the indigenous status of Māori is not a relevant difference and not sufficient to justify recognition of Māori customary law in legislation.

Conversely, equality arguments can be used to support the recognition of Māori customary law in legislation. Firstly, it could be argued that there are relevant differences between Māori and the rest of the population that would justify differential treatment. The main reason would be that Māori are the indigenous inhabitants of NZ and should have the right to allow their culture to survive and flourish.<sup>117</sup> This argument recognises the Crown's obligations under the Treaty of

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<sup>114</sup> Lucas, J R, "Against Equality" (1965) 1(154) *Philosophy* 296, 296.

<sup>115</sup> The importance of this concept is also apparent as, according to the Lord Bingham of Cornhill KG it forms part of the rule of law. He states that one aspect of the rule of law is that it should apply equally to all, save to the extent that objective differences justify differentiation: see Lord Bingham of Cornhill n111.

<sup>116</sup> Brash, D, *Nationhood: An Address by Don Brash Leader of The National Party to the Orewa Rotary Club on 27 January* (2004) <[http://www.national.org.nz/speech\\_article.aspx?ArticleID=1614](http://www.national.org.nz/speech_article.aspx?ArticleID=1614)>.

<sup>117</sup> Note that a similar argument was advanced by the Australian Law Commission in regards to the recognition of Aboriginal customary law in legislation. They stated that compelling reasons for this recognition are: "that Aboriginal people, as members of a distinct indigenous culture, have the right to the legal protection necessary to allow their culture to survive and flourish; that the bias and disadvantage experienced by Aboriginal people makes them more unequal than any other social or cultural group in Australia; that Aboriginal Australians do not access mainstream services at the same rate as other Australians therefore requiring targeted service provision; that

Waitangi and that Māori are Treaty partners and therefore deserve special recognition within the nation. Another equality argument that supports positive recognition of Māori customary law in legislation is the notion of equality of recognition.<sup>118</sup> This equality focuses on equality between peoples and identities as opposed to that amongst individuals. Equal recognition of Māori would call for institutional and jurisdictional spaces within a state's public sphere to be devoted to the recognition of the indigenous identity as much as that of the dominant culture. On this view the Māori culture and its laws deserve just as much recognition as the wider NZ culture.

A specific contention that has arisen is the rejection of references to Māori customary law in legislation on the grounds of religious equality. In particular this argument doubts whether the spiritual or cultural beliefs of one group should be prioritised over others. Because customary law is cultural and on a holistic Māori view it is inseparable from its religion and underlying belief system, there are issues that arise when it is the only form of religious belief system recognised in legislation. For example, Round, in discussing the Māori provisions in the Resource Management Act 1991 (RMA), suggests that these sorts of references are discriminatory and dangerous and under the "guise of biculturalism a real state religion is being introduced".<sup>119</sup> He states this is "a gross offence to the majority of citizens - including many Māori - professing another religion (or none)".<sup>120</sup> Adhar also sees a conflict between the existence of these sorts of provisions and the continuing secularity of the NZ state.<sup>121</sup> He comments that the statutory

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Aboriginal people are often subject to two laws and may be punished twice for the for the same offence; and that Aboriginal people suffer such underlying systemic discrimination in the criminal justice system that they have become the most disproportionately imprisoned culture in Australia. Perhaps the most persuasive argument supporting differential treatment of Aboriginal people by recognition of certain customary laws and practices is found in Aboriginal peoples' unique status as the original inhabitants of Australia." See Law Reform Commission of Western Australia, "Chapter One: Challenging Customary Law Myths and Misconceptions" (2006) (Project 94) *Aboriginal Customary Laws: The interaction of Western Australian Law with Aboriginal Law and Culture* <[http://www.lrc.justice.wa.gov.au/2publications/reports/ACL?FR/Chapter\\_1.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/ACL?FR/Chapter_1.pdf)> accessed 22 September 2009.

<sup>118</sup> See Pattern, A "Equality of Recognition" in Catriona McKinnon and Iain Hampsher-Monk (eds), *The Demands of Citizenship* (Continuum, 2000) 193, 193-211 for a more detailed discussion of the concept of equality of recognition.

<sup>119</sup> See generally Round, D, "Here be Dragons" (2005) 11(1) *Otago Law Review* 31, 51.

<sup>120</sup> Ibid.

<sup>121</sup> See generally Adhar, R, "Indigenous Spiritual Concerns and the Secular State: Some New Zealand Developments" (2003) 23(4) *Oxford Journal of Legal Studies* 611.

recognition of Māori spiritual beliefs is against the liberal ideals of religious equality and neutrality.<sup>122</sup>

The scope of this discussion is too vast for this dissertation. However, suffice to say that notions of religious equality are cultural in themselves and as recognised by Adhar, there are other perspectives such as those of liberal theists and affirmative action liberals who are more supportive of singling out Māori culture in statute.<sup>123</sup> Further, it can be argued that NZ has never been a ‘pure’ secular state,<sup>124</sup> and one needs to take into account the history of this country, including the Treaty of Waitangi. There are thus a number of sides to this argument.

This chapter has identified a number of positive and negative aspects of incorporating Māori customary law into legislation. It has shown that whether a consequence of incorporation should be labelled ‘positive’ or ‘negative’ is never clear cut. Firstly, it is largely dependent on one’s perspective. Secondly, some of the impacts of incorporation have a fluid quality. For example, the parliamentary process can both favour and hinder the favourable recognition of Māori customary law depending on the parliamentary make-up at the time.<sup>125</sup> The strength of some of the arguments advanced is also dependent on the form of incorporation. For example, the drawbacks associated with Māori customary law being subject to judicial interpretation and non-Māori decision-making may not be apparent if legislation provides that *imi* or Māori are the ones to interpret and apply their custom. This discussion therefore leads into the next chapter which looks at specific forms of incorporation and discusses the benefits and disadvantages of these.

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<sup>122</sup> Ibid, 635.

<sup>123</sup> See Adhar n121, 628-631 where Adhar in his article explains that ‘liberal theists’ are strong supporters of the Treaty of Waitangi as they are concerned that churches address issues of social injustice. They therefore take a broad and inclusive view of other peoples’ religions. In a similar vein are the ‘affirmative action liberals’. This group of people also focus on the Treaty of Waitangi and endorse a policy of active promotion and support for Māori. They ‘unashamedly’ single out Māori culture (in all its manifestations) as deserving of special recognition and state assistance.

<sup>124</sup> Ibid, 634 where Adhar states that Christian symbols and rituals also formed a minor, but important, thread in the tapestry of NZ public life.

<sup>125</sup> Similarly, the flexibility of legislation can also be seen as both a good or bad thing depending on how it is utilised and the notion of equity can also be argued both ways.

## **CHAPTER THREE: DELVING DEEPER**

### **AN EXAMINATION INTO SPECIFIC FORMS OF INCORPORATION**

This chapter builds on Chapter Two, by looking at specific ways in which Māori customary law can be incorporated into legislation. I firstly provide a theoretical framework within which various forms of statutory incorporation can be conceptualised. I then examine three particular forms and discuss their advantages and drawbacks.

According to Dr Anne Griffiths there is a continuum of legal pluralism that varies according to the degree of centrality accorded to state law.<sup>126</sup> At the one end of the continuum, state law defines the conditions under which legal pluralism is said to exist, including the recognition of customary law.<sup>127</sup> However, at the other end, the centrality of state law is displaced by recognition it may be only one element in a situation of legal pluralism, giving rise to the possibility that customary law is not dependent on state law for its validity.<sup>128</sup> This latter and stronger form of legal pluralism envisages state law and customary law as equally valid sources of law, in which neither is necessarily dependent on the other for its recognition. This dissertation is focused on the recognition of Māori customary norms within legislation. Therefore its discussion is framed within the scope of the weaker form of legal pluralism whereby state law incorporates, controls and defines the extent to which Māori customary law is recognised.

Within this weak form of legal pluralism, however, I contend that there is also a spectrum ranging from a strong form of weak legal pluralism to a weak form. An example of a strong form would be where custom is incorporated into legislation in a pure form, with the consequence that Māori retain considerable control over the interpretation and application of

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<sup>126</sup> Griffiths, n46.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

their norms. Conversely, where Māori have little or no control over the custom once incorporated a weak form of weak legal pluralism would exist.

A relatively strong form would be where legislation extensively recognised Māori customary law as a valid source of law. This has not yet occurred in NZ. However, an example of this is found in the 1960 Constitution of the Independent State of Samoa. Under s111 of this Constitution, the “law” that is to be applied in Samoa includes the Constitution, any Act of Parliament, the English common law, equity, and *any custom or usage* which has acquired the force of law in Samoa.<sup>129</sup> This general recognition of customary law is somewhat problematic, however, as although custom is explicitly recognised as a source of law, so too are other sources. Therefore in reality it is a matter of discretion for judges of the general courts, as to whether custom will prevail when there is a conflict with other sources.<sup>130</sup> Customary law is therefore not given unqualified recognition and the judiciary play a large role in determining its primacy.

Another more particular recognition of custom as a source of law is in respect of customary land in Samoa. In section 103 of the Samoan Constitution, a Land and Titles Court is established, which according to the Land and Titles Act 1981, *must* apply the law relating to custom and usage.<sup>131</sup> This specialist Court, whose primary function is to resolve disputes regarding customary lands, therefore principally applies customary law in its work. This is significant as customary land makes up about 80 percent of Samoa’s acreage.<sup>132</sup> It is therefore a notable illustration of a reasonably strong form of weak legal pluralism where a significant niche is carved out of the state legal system and custom pertaining to land is recognized and applied as a valid source of law.

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<sup>129</sup> Emphasis added.

<sup>130</sup> For example, in the case of *Taamale v Attorney-General of Western Samoa*, [1995] WSCA 1, which involved customary power of banishment, it was held by the Court of Appeal of Western Samoa that despite Article 13(1)(d) that confers on all citizens the right to freely move and reside throughout Western Samoa, the custom of banishment was a reasonable restriction on this right. This case illustrates an example of custom prevailing in the balancing act. However, this will not always be the case.

<sup>131</sup> See s37 of the Land and Titles Act 1981.

<sup>132</sup> O’Meara, J T “From Corporate to Individual Land Tenure in Western Samoa” in Gerard Ward and Elizabeth Kingdon (eds), *Land, Custom, and Practice in the South Pacific* (Cambridge University Press, 1996) 109, 115.

Another strong form of weak legal pluralism, evident in NZ is the 1998 Fisheries (Kaimoana Customary Fishing) Regulations. These regulations allow Māori to appoint a ‘tangata tiaki’ who can authorise Māori to customarily take food resources for non-commercial purposes. This is a strong form of weak pluralism as Māori are essentially able to control, interpret and apply their customary law in respect of this specific practice.

In comparison, another form of incorporation, which is situated more towards the weak end of the weak legal pluralism spectrum, occurs where only one Māori customary concept, word or practice is incorporated into legislation and this legislation is interpreted and applied by non Māori decision-makers. In these instances, although Māori may play a part in the interpretation of the concept, the extent of Māori control is limited as ultimately the court or the decision-makers determine its application. As a final example, an illustration that sits at the weak end of the spectrum is where the law has extensively codified custom. In these instances Māori may have little control over the form this codification takes, and no control or input into the interpretation or application of the resulting law.

Different forms of legislative incorporation of Māori customary law therefore sit at distinct places on this spectrum of weak legal pluralism. Where an incorporation sits will depend on a number of aspects of the statutory design, including considerations such as how the custom is referred to, who the decision-maker is, how the custom is interpreted and whether the custom is merely a consideration or has to be applied. In addition, each of these aspects of the legislative formulation has distinct benefits and drawbacks.

This chapter will explore three forms of incorporation that lie on this spectrum of weak legal pluralism, and will examine some of the positives and negatives of these forms: 1) incorporation of Māori customary law by recognition of Māori authority to apply a customary norm; 2) incorporation of a Māori concept or word into legislation; and 3) incorporation by extensive codification. These forms are particularly contrasting and sit at various ends of the weak legal

pluralism spectrum. Each form will be illustrated by reference to one or two specific NZ examples which serve to highlight either an advantage or weakness of incorporating Māori custom into that particular form.

### **Legislative Recognition of Māori Authority to Apply a Customary Norm**

This is one of the stronger forms of pluralism (on the weak pluralism spectrum). A specific example is the Fisheries (Kaimoana Customary Fishing) Regulations 1998.<sup>133</sup> These regulations, which arose as a response to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992,<sup>134</sup> allow *tangata whenua* of an area to appoint a 'kaitiaki' or 'tangata tiaki'.<sup>135</sup> This person, or group of people, once confirmed by the Minister of Fisheries, gains the power to authorise individuals to take aquatic life for customary, non-commercial, food gathering purposes.<sup>136</sup> These authorisations can require that the taking of the fisheries resources be consistent with the *tikanga* of the *tangata whenua* of that customary food gathering area.<sup>137</sup> This means that regional variations between different *imi* and *hapū* are provided for. According to a 2006 report by the Minister of Fisheries there are 16 areas that have gazetted *tangata tiaki*.<sup>138</sup>

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<sup>133</sup> Note that these regulations do not apply to the waters or fisheries in the South Island. The customary fishing of the South Island is dealt with in separate regulations called the Fisheries (South Island Customary Fishing) Regulations 1999. These are very similar to the regulations that apply in the North Island.

<sup>134</sup> Under section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 the Minister of Fisheries was required to recommend to the Governor-General in Council the making of regulations pursuant to section 89 of the Fisheries Act 1983 (now section 186 of the Fisheries Act 1996) to recognise and provide for customary food gathering by Māori and the special relationship between *tangata whenua* and those places which are of customary food gathering importance, to the extent that such food gathering is neither commercial in any way nor involves any commercial gain or trade.

<sup>135</sup> See s 5 of the Fisheries (Kaimoana Customary Fishing) Regulations 1998.

<sup>136</sup> See s 11(1) of the Regulations.

<sup>137</sup> See s 11(2) of the Regulations.

<sup>138</sup> This includes: Ngā Hapū o Taiaimai Ki Te Marangi (Northland), Okapu Marae, Ngāti Te Wehi (Aotea, west coast), Marokopa Marae (Ngāti Kinohaku, Ngāti Te Kanawa & Ngāti Peehi) (Marokopa, west coast), Ngā Hau o Aotea Moana (Aotea, west coast), Ngāiterangi, Ngāti Ranginui & Ngāti Pukenga (Bay of Plenty), Ngai Tai Iwi (eastern Bay of Plenty), Kaiaia Hapū (eastern Bay of Plenty), Te Whānau a Maruhaeremuri (eastern Bay of Plenty), Tapaeururangi (East Cape), Te Whānau-a-Hunaara (East Cape), Paiea Whitireia Trust (Ngāti Konohi) (Gisborne), Ngai Te Ruruku o Te Rangī (Hawke Bay), Ngā Hapū o Wāimarama & Ngāti Hāwea (Wairarapa), Kairakau Lands Trust (Wairarapa), Ngāti Kere (Wairarapa), Te Hika o Papauma (Wairarapa): see Ministry of Fisheries, *Comparison of spatial management tools* (2006) <<http://www.fish.govt.nz/en-nz/Recreational/Recreational+Forums/Upper+North+Island/Reference/Comparison+of+spatial+management+tools.htm>> accessed 12 September 2009. It is also notable that there has been much disagreement among *tangata whenua* as to which group has the authority in an area. In many cases there have been large numbers of competing claims for status, and few resources are available to facilitate resolution. This has resulted in a lot of the North

This recognition of Māori customary law is a relatively strong form of weak legal pluralism as it imports into the state legal system both the substantive primary norms of Māori customary law and some of its secondary rules.<sup>139</sup> The regulations substantively provide for custom as they bring Māori fishing norms within the law. They permit those that acquire a customary authorisation to legally take fish and aquatic life that they otherwise would not be able to take under the generic NZ recreational quotas and restrictions.<sup>140</sup> Some examples of the types of authorisations that could be granted are when food is required for *koba*,<sup>141</sup> *tangihanga*<sup>142</sup> or a big *hui*.<sup>143</sup>

Further, the fishing practices that are authorised must be customary. This means they would have to be recognised as custom by the *tangata whenua* of that region, according to their rules of recognition, under *tikanga*. A fishing practice may only be recognised as customary, for instance, when endorsed by *kaumātua*, or where widely accepted by members of the customary group. These sorts of Māori rules of recognition are therefore incorporated into the legislation.

The Māori rules of adjudication are also incorporated into legislation to a certain extent. The regulations specifically state that if there is a preliminary dispute as to boundaries, who the *tangata whenua* are, or who should be the *tangata tiaki*, then the Minister must recommend that the parties agree to a dispute resolution process that is consistent with *tikanga* Māori.<sup>144</sup> If they cannot come to a resolution they must take it to an agreed authority, such as the Māori Land Court.<sup>145</sup> These initial decisions and disputes are therefore to be adjudicated in a Māori way. Other aspects of custom that could be the subject of dispute, however, are not specifically mentioned in the

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Island coastline being without appointed Tangata Tiaki: see Sea Net, *Customary Fishing Rights and Tangata Kaitiaki/Tiaki*. <[http://seanet.org.nz/index.php?option=com\\_content&task=view&id=154&Itemid=55](http://seanet.org.nz/index.php?option=com_content&task=view&id=154&Itemid=55)> accessed 12 September 2009.

<sup>139</sup> As discussed in n74 the secondary rules of a legal system according to Hart are the rules of recognition, the rules of adjudication and the rules of change.

<sup>140</sup> Note that the generic taking of aquatic life is governed by the overarching Fisheries Act 1996.

<sup>141</sup> In this context *koba* translates as gift or present:

<sup>142</sup> This is a phrase used for a Māori funerary practice: see generally Higgins, R and Moorfield, J C "Tangihanga: Death Customs" in Tania M Ka'ai et al (eds), *Ki Te Whaiao* (Pearson Education New Zealand, 2004) 85, 85-90.

<sup>143</sup> This translates as a congregation or meeting.

<sup>144</sup> See generally article 8 of the Regulations.

<sup>145</sup> See article 8(4) of the Regulations.



regulations, for example, what is ‘customary’ food gathering? Accordingly, although the *tangata tiaki* is to apply custom in the first respect, an authorisation by the *tangata tiaki* to gather food can be judicially reviewed by the general courts on the grounds that it is not ‘customary’, or that it is non-commercial. There is therefore a judicial backstop that ensures accountability and that the *tangata whenua* do not abuse or overly exploit what is ‘customary’.

A benefit of this form is many aspects of custom are not, at least in the first instance, subject to interpretation or application by non-Māori decision-makers and the courts. The *tangata tiaki* is appointed by the *tangata whenua* of the area and is therefore likely to be Māori and familiar with the intricacies of the local customary law pertaining to food gathering. This means, at least initially, the translation problems that can occur when cultural concepts are explained and interpreted in a different context are unlikely to arise. Of course, if a dispute develops and the courts do become involved, the risk of misinterpretation is manifested. However, this needs to be weighted against the positive that the court can act as a safety net in the event of an abuse of the authority conveyed by these regulations. There are thus a number of competing considerations in evaluating whether this aspect of the regulations is a positive or negative. I would contend that provided the court does not dictate the content of the custom and only operates to prevent an overly expansive interpretation of custom, there seems to be an appropriate balance struck by the legislation as to the proper adjudicatory and decision-making mechanisms.

The Fisheries (Kaimoana Customary Fishing) Regulations therefore seem to incorporate customary fishing practices into legislation in a relatively pure state. Customary values do not have to be balanced against a number of competing considerations and there are only a couple of conditions, such as the reporting requirements and the non-commercial element, that qualify this custom.<sup>146</sup> This means the nature of the custom is not fundamentally altered through legislative

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<sup>146</sup> See the accountability mechanisms in sections 35-40 of the regulations.

incorporation. Even though the custom sits within state legislation, and this perpetuates the dominance of the colonial legal structure in its current form, the degree of Māori control involved means that this incorporation does not seem to be a ‘colonisation’ of the custom. It therefore appears more advantageous to recognise this custom within legislation than to exclude it. Under the current constitutional arrangements, to exclude this recognition would mean that Māori would be bound by the general regulations governing non-commercial fishing within NZ. That might require Māori to limit the exercise of their custom, and if their take was to exceed catch limits, then they would be liable to prosecution.

This form of incorporation therefore brings a large part of the custom into legislation, including some of its secondary rules.<sup>147</sup> It gives Māori (or *tangata whenua*) the authority to carry out a practice with a large degree of autonomy over the content, application and interpretation of their customary law. Therefore, despite being found within state legislation and subject to later revision by parliament, this is a relatively strong form of weak legal pluralism.

Although there are a number of advantages in this form, one of the implications is significant discretion is conferred on the *tangata tiaki*. This may produce uncertainty. Apart from the requirement that the fishing must be ‘non-commercial’ in nature, there are no express regulatory limits as to how many customary authorisations can be given out, or as to the scope of the fishing that may be authorised. For some, this may be a concern, as it may appear to leave the provisions, and therefore the natural resources, open to be exploited. However, this is mitigated by the reporting requirements that ensure Māori customary catches are ultimately accounted for.<sup>148</sup> Further, because authorisations have to be for ‘customary’ food gathering purposes, they are constrained by custom. Any perception of uncertainty may therefore be driven by a lack of

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<sup>147</sup> Note that similar arguments apply in respect of the secondary rules of change. Because the authorisation has to be ‘customary’ and potentially in accordance with the *tikanga* of the *tangata whenua*, this is likely to mean that the rules concerning how custom can change are directly relevant.

<sup>148</sup> See generally articles 35-40 of the regulations.

knowledge among the general NZ public as to the limitations that are attached to custom.<sup>149</sup> For example, although large amounts of seafood may be required to provide for big *tangihanga*, this is tempered by the customary notions of *kaitiakitanga*,<sup>150</sup> *manaaki*,<sup>151</sup> and the idea that the *atua*,<sup>152</sup> which are embodied in the natural world and are the eponymous ancestors of Māori,<sup>153</sup> should not be over-exploited. In accordance with custom, Māori are unlikely to be permitted to take copious amounts of food in a manner that exhausts the resource.<sup>154</sup> Therefore, although there is an element of uncertainty, as Māori custom is based on the weighing of values as opposed to specific stipulations of a maximum catch,<sup>155</sup> the more the custom is understood, the less uncertain it is.

Another perceived negative is that non-Māori fishermen and food gatherers may see these regulations as being unequal as ultimately Māori can be permitted to take more food than others. However, the notion of equality is inherently complex and the opposing side of this argument is there are relevant differences between Māori and the rest of the population that would justify differential treatment. Māori are the indigenous peoples of the land and the Treaty of Waitangi, the founding document of modern NZ, specifically guaranteed Māori the full exclusive undisturbed possession of their fisheries (in the English version) and the unqualified exercise of

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<sup>149</sup> A lack of knowledge of custom among the judiciary stimulated the NZ Law Commission to write its report (see The NZ Law Commission, n7, vii) as Justice Durie was of the view that some knowledge of Māori custom would greatly assist judges in carrying out their judicial functions. This highlights the lack of knowledge that some people in NZ have in respect of Māori customary law.

<sup>150</sup> The NZ Law Commission has stated that *kaitiakitanga* denotes the obligation of stewardship and protection and requires the observance of conduct respectful of the resources in question (see The NZ Law Commission, n7, 40).

<sup>151</sup> This means to show respect or kindness too.

<sup>152</sup> Which translates as 'gods' or 'super-natural being': see *ibid*, 20.

<sup>153</sup> See Higgins, R and Ka'ai, T M "Māori World-View" in T M Ka'ai et al (eds), *Ki Te Whaiao* (Pearson Education Limited, 2004) 13.

<sup>154</sup> For example the Māori ethic is that each generation is obliged to pass on to their descendants at least as good a supply of resources as they inherited: see Williams, J "Papa-tua-nuku: Attitudes to Land" in Tania M Ka'ai et al (eds), *Ki te Whaiao* (Pearson Education New Zealand, 2004) 51, 52. The implication of this is that custom is likely to prevent the exploitation and pillaging of resources, unless the authorisation system is being abused, in which case decisions can be judicially reviewed by the courts.

<sup>155</sup> This is illustrated in the NZ Law Commission report that stated that *tikanga* Māori comprise a spectrum with values at one end and rules at the other, but with values informing the whole range (see The NZ Law Commission, n7, 17).

their chieftainship over their treasures (in the Māori version).<sup>156</sup> Further, it would arguably be substantively unequal to not allow Māori to exercise their cultural customs and practices.<sup>157</sup> The notion of equality can therefore be argued both ways.

This form of incorporation, where Māori are essentially given the authority to carry out a customary practice, therefore has a number of benefits for Māori. This includes: the custom gaining legal force, it being largely inserted intact<sup>158</sup> and it being controlled, interpreted and applied primarily by Māori decision-makers. Although there are likely to be some trepidation regarding uncertainty and inequality, there are counter arguments to these concerns. This form of legal pluralism therefore has a number of positive qualities from a Māori point of view.

### **Incorporation by Reference to a Māori Word/Custom**

Another form, in which Māori customary law can be incorporated into legislation, is for a statute simply to refer to a Māori word or custom. The initial problem with this type of incorporation is the difficulty in determining whether Parliament intends to effect a statutory incorporation of Māori customary law, or is merely using a Māori word.<sup>159</sup> This is an important distinction because if there has been a legislative incorporation of 'Māori customary law' then it will be treated as foreign law and proof of the content of the custom by appropriate experts will be required.<sup>160</sup> Where there has been a mere use of Māori words, however, their meaning may be treated as an ordinary matter of statutory interpretation, whereby the court relies on general linguistic argument or what can be ascertained from dictionaries.<sup>161</sup> The dividing line between

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<sup>156</sup> Note that article 2 of the Māori version of the Treaty of Waitangi specifically guaranteed Māori '*te tino rangatiratanga o o rātou wenua o rātou kainga me o rātou taonga katoa*' (the English translation of the Māori version above is by I H Kawharu (ed) "Appendix" in *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (1989) 319. It is notable that the word 'taonga' can be translated as those things which are held precious. This would include Māori customs and their fisheries.

<sup>157</sup> This substantive equality argument is based on the contention that Māori are more culturally disadvantaged by the quota restrictions.

<sup>158</sup> Note that this includes the secondary rules of Māori customary law.

<sup>159</sup> Boast, n18, 36.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

the two is thin yet important.<sup>162</sup> In NZ there has been no concrete or consistent practice established in regards to when the use of a Māori word is to be treated as an incorporation of customary law or just the use of another Māori word.

An example that highlights the implications of treating an incorporation of a Māori word as merely being one word to interpret in the usual way is the reference to the Māori concept of 'taonga' in the Property (Relationships) Act 1976. Under section 2 of this Act, *taonga* are excluded from the definition of 'family chattels'. This generally means that the item in question would not be considered 'relationship property' and therefore not subject to equal division when a couple separates.<sup>163</sup> According to Ruru, this exclusion signalled *taonga* were property that had special cultural and ancestral significance for Māori tribes.<sup>164</sup> It recognised, in accordance with *tikanga* Māori, 'individuals are not seen as owning such property... a person in possession of taonga is more of a guardian of taonga for the rest of the tribe and for future generations'.<sup>165</sup> In interpreting the definition of 'taonga', however, which is not defined in the Act, it is apparent judges have tended to treat it as a mere reference to a Māori word. In the case of *Page v Page*,<sup>166</sup> Justice Eddie Durie<sup>167</sup> in an obiter comment, indicated that the ability to claim a chattel as a *taonga* was not restricted to Māori alone.<sup>168</sup> Further, in the case of *Perry v West*,<sup>169</sup> Mather J stated "Although it is a Māori word, it describes a relationship between a person or persons and property, and I see no reason why it cannot apply to a person of any ethnic or cultural background". Although the chattel in question in this latter case was ultimately held not to be a

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<sup>162</sup> An example of this can be shown in the cases that contest the word '*imi*'. See Boast, n18, 36-37.

<sup>163</sup> See s11 of the Property (Relationships) Act 1976.

<sup>164</sup> Ruru, J, "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 *International Journal of Law, Policy and the Family* 327, 346.

<sup>165</sup> Ministry of Justice and Women's Affairs "Report of the Working Group on Matrimonial Property and Family Protection" (Ministry of Justice and Women's Affairs, 1988) cited in Ruru, 164, 336.

<sup>166</sup> (2001) 21 FRNZ 275.

<sup>167</sup> One of the most prominent Māori jurists.

<sup>168</sup> See paragraph 46 of *Page v Page* (2001) 21 FRNZ 275 where Justice Durie states that although the Property (Relationships) Act was not applicable, as this case was heard under the old Matrimonial Property Act 1976, it seems that the ordinary and everyday meaning of 'taonga' in the context of the Act would encompass the artworks of the mother. In this case the mother and the people involved were not Māori, nor did the artwork in contention have any apparent Māori association.

<sup>169</sup> 25 March 2003, DC Waitakere, FP 239/01.

*taonga*,<sup>170</sup> this dictum seems to be setting a precedent, namely, that an item can be classified as *taonga* even though it may have no Māori association, it was not owned by Māori, made by a Māori person, or depicted any aspect of Māori culture.<sup>171</sup> In both cases Māori were not called upon to give evidence as to the content and interpretation of the term.<sup>172</sup>

The implication of treating an incorporation of a Māori word in such a manner is although the word can still retain something of its Māori meaning it may be taken out of its cultural context and given generalised statutory application. In comparison, an incorporation of Māori customary law may confine or narrow the interpretation of the term. If the word ‘taonga’ were regarded as an incorporation of Māori customary law, the interpretation would likely be narrower, special in its context and not of general application. As stated by Ruru: “the recent judicial interpretation of taonga is a prime example where the court has adopted the simple literal translation of the word – ‘anything highly prized’ – without grasping the wider implications of the Māori world being modelled on collective responsibilities”.<sup>173</sup> She thinks this demonstrates the vulnerability of customary law when it is not defined by the Act or restricted to an interpretation consistent with a Māori world view.<sup>174</sup> Another disadvantage for Māori of such incorporation is that Māori may have no input into how the concept is to be interpreted and applied. This opens the possibility the concept will be interpreted incorrectly.

The incorporation of ‘taonga’ in the Property (Relationships) Act 1976 can be compared to the reference to ‘kaitiakitanga’ in the RMA. Under the RMA, regional and local governments are primarily responsible for regulating the natural and physical resources in NZ. Those acting under the Act must take into account a number of considerations. Under section 7(1)(a), one of

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<sup>170</sup> Both by Mather J in the District Court and Laurenson J in the High Court: see *Perry v West* (2003) 23 FRNZ 204.

<sup>171</sup> Ruru, J, "Taonga and family chattels" (2004a) *New Zealand Law Journal* 297.

<sup>172</sup> This is further evident in the High Court appeal case of *Perry v West* (2003) 23 FRNZ 204 where the authorities consulted by Laurenson J included dictionaries, some judicial comment and a book chapter. For example, he referred to the definition of ‘taonga’ in the Oxford New Zealand Dictionary edited by H.W. Orsman 1997, The Reed Dictionary of Modern Māori by P.M Ryan (1995), the case of *Taranaki Fish & Game v McRitchie* [1997] DCR 446, and Relationship Property in New Zealand by Atkin & Parker, Chat. 3.4.5 Heirlooms and Taonga.

<sup>173</sup> Ruru, n164, 336.

<sup>174</sup> Ibid.

these considerations is *kaitiakitanga*.<sup>175</sup> This is defined in s2 of the RMA as: ‘the exercise of guardianship by the *tangata whenua* of an area *in accordance with tikanga Māori* in relation to natural and physical resources; and includes the ethic of stewardship’. This reference specifically limits the interpretation of ‘kaitiakitanga’ to that consistent with a Māori world view. This was not previously the case as, until the RMA was amended in 1997,<sup>176</sup> *kaitiakitanga* was defined as “The exercise of guardianship; and in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself.” This initial definition divorced the term from its Māori cultural context. This was evident in the case of *Rural Management Limited v Banks Peninsula District Council*<sup>177</sup> where Judge Treadwell stated that *kaitiakitanga* is not a concept to be restricted to Māori, but is a general concept with a statutory definition.<sup>178</sup> The amended definition, however, has meant the term *kaitiakitanga* has generally been treated by the courts as an incorporation of Māori customary law. This is supported by relevant case law where the Environment Court has heard evidence from Māori as to the content of their customs pertaining to *kaitiakitanga*.<sup>179</sup>

The different way in which these references to Māori concepts have been treated shows not only is the form of incorporation vital but judicial discretion also plays a large role. If there is no clear legislative directive the judiciary essentially have the discretion to decide whether Māori words should be treated as legal matters or matters of fact (where expert evidence needs to be heard). This matter is currently challenging the NZ legal system.

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<sup>175</sup> Section 7(1) of the Resource Management Act 1991 states that: “In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to (a) Kaitiakitanga”.

<sup>176</sup> By s 2(4) of the Resource Management Amendment Act 1997.

<sup>177</sup> [1994] NZRMA 412.

<sup>178</sup> The Judge thus went on to find that *kaitiakitanga* could apply and be exercised by the Regional Council.

<sup>179</sup> For example in the case of *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 it was held that the Environment Court made an error of law in rejecting as mere assertion the oral evidence of *kaumātua* (elders) as to the presence of *kōiwi* (human remains) and *taonga* (treasures) in the swamp without giving a rational basis for that rejection. The evidence was fundamental to the case of the Takamore Trustees. In light of the nature of the subject-matter, there was a clear need for the Environment Court to explain why it had rejected the evidence, which could only have been based on oral history. To accept only documented and precise evidence on such matters would mean that there would be little evidence available in support of ss 6(e), 7(a) and 8. This case thus shows that oral evidence as to what constitutes a custom is to be heard in court.

If an incorporated Māori word is considered embedded in ‘customary law’, a number of positives and negatives may still flow. One initial problem with ‘*kaitiakitanga*’ is that its interpretation may still be dislocated from its wider cultural context. As Hemi puts it:

‘Herein lies the failure of the RMA. It attempts, by statutory definition, to recognise certain choice elements of *kaitiakitanga* while failing to account for any of the remaining elements.... Māori concepts when treated in isolation are incapable of proper function and development. In fact any concept when divorced from its cultural base is subject to dysfunction and cultural reinterpretation or hi-jack’.<sup>180</sup>

This statement, although written before the definition of *kaitiakitanga* was amended, is still relevant to the current definition. It recognises that out of the whole body of intertwining principles that constitute customary law, the legislation extracts one part, and places it in a legislative and adjudicatory context that is not indigenous or Māori. This is not to claim that the wider statutory context of the RMA is always inconsistent with the notion of *kaitiakitanga*, as its overarching objective, to promote the sustainable management of natural and physical resources, reflects certain elements of *kaitiakitanga*.<sup>181</sup> Further, in some instances the values in the RMA will be balanced in such a way it will require decisions to be made that are consistent with this notion.<sup>182</sup> So *kaitiakitanga* is not completely isolated from its cultural base, as it is to be interpreted in accordance with *tikanga Māori* and there are other provisions in the RMA that implicitly recognise it. But, it is still exposed to ramifications of being placed in a foreign legislative and adjudicatory context.

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<sup>180</sup> See Hemi, M A *Tinorangatiranga: Assessing the Resource Management Act* (Masters Thesis, Lincoln University, 1991) cited in Durie, M *Te Mana, te Kāwanatanga: the Politics of Māori Self-determination* (Oxford University Press, 1998) 29.

<sup>181</sup> Note that the purpose of the RMA is set out in s5(1). This specifically states: ‘The purpose of this Act is to promote the sustainable management of natural and physical resources.’ This purpose has some similarities with the notion of *kaitiakitanga* as the idea behind *kaitiakitanga* is to protect and care for resource for future generations (see Williams, n154, 52).

<sup>182</sup> For example, in the case of *Te Rūnanga o Taumarere v Northland RC* [1996] NZRMA77, the court gave an interim decision that encouraged the applicants, who were applying for a resource consent to discharge treated effluent into the water, to rethink the proposals, the primary reasons being that the proposal did not provide for the well-being of Māori, the needs of future generations, or amenity values. It was also held to be an inappropriate use of the coastal environment and it did not provide for the relationship of Māori to their *taonga*. Basically, this case shows that in some instances, even when *kaitiakitanga* is not a prime consideration, that the court will decide in accordance with the notion of *kaitiakitanga*.



One ramification is that the people who apply and interpret the reference to *kaitiakitanga* (usually local council members or the courts) may not have any understanding of *tikanga* Māori and the Māori world. This leaves open the potential for misinterpretation, particularly if, because it is unfamiliar to the decision-makers, the term has to be translated into English to be applied. The problem of using English equivalents of Māori words is there is a tendency to assume Māori and Pākehā are saying the same thing, which often they are not.<sup>183</sup> Translations may therefore not be capable of conveying the full and appropriate concept.<sup>184</sup> *Kaitiakitanga*, for example, can have many different shades of meaning and a short English translation such as ‘guardianship’ or ‘stewardship’ runs the risk of diminishing the deeper meaning of the Māori word and the spiritual context from which it derives.<sup>185</sup> So, in translating a Māori concept, there may be a reduction and reconstitution of those concepts so as to make them comprehensible to those applying them. As stated by Selwyn Hayes:

A concept such as *kaitiakitanga* cannot be accurately translated into an equivalent Pākehā concept, as its origin is derived from a spiritual rather than an English jurisprudential background. In addition there is no single Māori perspective on its meaning that is applicable to all *iwi* or *hapū*. Any such redefinition inevitably becomes an ill-fated attempt at decolonising the law.<sup>186</sup>

This translation process is negative for Māori as no doubt there would be a loss if Māori environmental norms were to become in some sense codified so as to make them useful and acceptable in the RMA environmental regime, rather than understood and maintained in the context of the complex spiritual world-view with which they were traditionally inextricably

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<sup>183</sup> Durie, n180, 32.

<sup>184</sup> See Metge, cited in The NZ Law Commission, n7, 29-30, who states: ‘To come to grips with Māori custom law, it is necessary to recognise that Māori concepts hardly ever correspond exactly with those Western concepts which they appear, on the surface, to resemble. While there is a degree of overlap, there are usually divergences as well. Even if the denotation – the direct reference – is substantially the same, the connotations are significantly different. Commonly, several sentences of explanation are needed to deal adequately with the similarities and divergences. For these reasons it is unwise (although tempting for the sake of brevity) regularly to translate the Māori word for a concept by a single English word or phrase for listeners inevitably hear the English meaning.’

<sup>185</sup> Durie, n180, 31.

<sup>186</sup> Hayes, S, "Defining Kaitiakitanga and the Resource Management Act 1991" (1998) 8 *Auckland University Law Review* 893, 893.

linked.<sup>187</sup> Therefore, even though *kaitiakitanga* is to be interpreted in accordance with *tikanga* Māori, there is still concern that the translation process may reduce the concept to ‘stewardship’ or ‘guardianship’, the words which accompany *kaitiakitanga* in s7(1)(a) of the RMA.<sup>188</sup> The reference to *kaitiakitanga* can therefore be read down and cloaked with Pākehā terms of lesser significance.

A related argument is that, although it is positive that Māori at least play a role in the interpretation of the concept, ultimately the judiciary have the final say. This is evident in the case of *Auckland RC v Arrigato Investments Ltd*,<sup>189</sup> where it was held that in the event of conflicting evidence as to Māori customary values and practices, it is open to the Environment Court to accept the evidence of one Māori over another. In the event of a conflict it is the court that ultimately decides the content and applicability of *kaitiakitanga*. There are some difficulties in this given the translation issues discussed above, and the fact that the adversarial court system may accentuate differences between opposing positions.

Whether incorporating a Māori word or concept into legislation is advantageous or not also depends on the precise statutory effect. What are the legal implications, or precise intentions of Parliament, in incorporating this norm? The legal rule into which the term is incorporated might provide for the unqualified exercise of the relevant Māori custom, or much weaker legal consequences might follow. In the Property (Relationships) Act 1976, if a chattel is held to be a ‘taonga’ it shall be excluded from the definition of ‘relationship property’.<sup>190</sup> There is thus an immediate consequence that flows from that incorporation.<sup>191</sup> But, in the case of *kaitiakitanga*, the RMA does not positively provide for its recognition, but instead simply acknowledges that if

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<sup>187</sup> Wainwright, C M *Where Law Works: A legal pluralist view of legislation as a means of advancing Māori interests* (LLM Thesis, Victoria University of Wellington, 1993) 56.

<sup>188</sup> Hayes, n186, 898.

<sup>189</sup> [2001] NZRMA 158 at para 55.

<sup>190</sup> See s2 of the Act which excludes ‘taonga’ from the definition of ‘family chattels’ (note that family chattels are considered to be part of relationship property as per s8 of the Act and therefore subject to equal division).

<sup>191</sup> Another example is the reference to the word ‘iwi’ in the Māori Fisheries Act 1989. In this Act, if a body qualifies as an ‘iwi’ or a group representing an ‘iwi’, they will be eligible to acquire assets. Thus, like the reference to ‘taonga’, a consequence flows directly from qualifying as an *iwi*.

it does exist, it should be considered and balanced against a number of other competing considerations.<sup>192</sup> *Kaitiakitanga* is thus subordinate to the overall purpose of the RMA which is to promote the ‘sustainable management of natural and physical resources’.<sup>193</sup> It is also technically subordinate to the considerations listed in section 6 of the Act,<sup>194</sup> and is only one amongst eleven other matters that must be regarded by a decision-maker under section 7.<sup>195</sup> The ultimate effect of this is that *kaitiakitanga* may be outweighed by other factors and the ability of Māori to exercise their customs in respect of *kaitiakitanga* may be overridden by an adverse decision.<sup>196</sup> This is recognised by Nicola Wheen who, referring to the broader Māori sections in the RMA, states:

The provisions make issues of belief relevant, but the way they are expressed in legislation and the flexible approach that decision-makers take to the task of applying the legislation in actual cases, means that Māori beliefs are unlikely to be determinative in situations where no compromise between the beliefs and the proposal is possible.<sup>197</sup>

This factor, which is negative for Māori, means the incorporation of *kaitiakitanga* into the RMA in this form is illustrative of a relatively weak form of legal pluralism as, although it allows for

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<sup>192</sup> See s7(1)(a) of the RMA.

<sup>193</sup> See s5(1) of the RMA.

<sup>194</sup> Under s6 decision-makers under this Act “shall recognise for the following matters of national importance: (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development: (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development: (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna: (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers: (e) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, *waahi tapu*, and other *taonga*: (f) The protection of historic heritage from inappropriate subdivision, use, and development: and (g) the protection of recognised customary activities.”

<sup>195</sup> Under s7 decision-makers “shall have particular regard to: (a) *Kaitiakitanga*: (aa) The ethic of stewardship: (b) The efficient use and development of natural and physical resources: (ba) the efficiency of the end use of energy: (c) The maintenance and enhancement of amenity values: (d) Intrinsic values of ecosystems: (e) *Repealed*: (f) Maintenance and enhancement of the quality of the environment: (g) Any finite characteristics of natural and physical resources: (h) The protection of the habitat of trout and salmon: (i) the effects of climate change: and (j) the benefits to be derived from the use and development of renewable energy”.

<sup>196</sup> In the case of *Contact Energy Ltd v Waikato RC* (2000) 6 ELRNZ 1, for example, it was specifically stated that despite the reference to *kaitiakitanga* the Court could not meet a claim by *kaitiaki* to make decisions that were inconsistent with the scheme of the Act. That is, *kaitiaki* and Māori do not have a veto over proposals and their views can be outweighed by other factors in the Act.

<sup>197</sup> Wheen, N R, "Belief and Environmental Decision-making: Some Recent New Zealand Experience" (2005) 15(3) *Journal of Environmental Law and Practice* 297, 317.

Māori to interpret the concept, it by no means permits the unqualified exercise of the right or practice.<sup>198</sup>

The fact that the reference to *kaitiakitanga* in the RMA reflects a weaker form of legal pluralism than the broader recognition of Māori customary fishing rights in the Fisheries (Kaimoana Customary Fishing) Regulations 1998<sup>199</sup> can perhaps be explained by the political and controversial nature of the RMA. The RMA is a far-reaching statute affecting many kinds of economic development. The effect of recognising a Māori concept and practice such as *kaitiakitanga* in such a politically charged context is that it has the potential to impact strongly on the wider community. This is likely to be one of the reasons why *kaitiakitanga* is not recognised in the Act as an unqualified practice or concept. The nature of the political process and the tyranny of the majority can therefore produce a disadvantage for Māori when the insertion of custom into statute is likely to have such an impact. This kind of political pressure may mean that notions such as *kaitiakitanga* will only ever be incorporated weakly as relevant considerations.

Despite these more ‘negative’ aspects of incorporation for Māori, arguably some recognition is better than nothing. History is a witness to the fact that if not included in the general law, such principles are likely to be completely disregarded.<sup>200</sup> This incorporation at least ensures that the Māori notion of resource management cannot be dismissed outright as being superfluous.<sup>201</sup> If these references did not exist, then the Māori environmental ethic would get no special consideration. Māori would simply become another interested party. Legislative incorporation

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<sup>198</sup> Juliane Chetham recognises the difficulty in this for Māori. She states that: “perhaps the most difficult issue for Māori is that a fundamental principle of Māori society has been reduced to one factor for consideration among many in the context of the RMA” (see Chetham, J *Kaitiakitanga and the Resource Management Act: Tangata Whenua, Participation, and Morality* (MSc Thesis, The University of Auckland, 1998) 22.

<sup>199</sup> Note that this conclusion is drawn from the observation that there seems to be little academic and public critique regarding the Fishing regulations. *Kaitiakitanga* and the other references to Māori concepts in the RMA have been the subject of much criticism and debate.

<sup>200</sup> For example the Māori attitude to resource management was not traditionally expressly to be taken into account under the old Town and Country Planning Act (see Ruru, T S *The Resource Management Act 1991 and Ngā Inī Māori* (LLM Thesis, University of Otago, 1997) 88.

<sup>201</sup> *Ibid*, 87-88.

at least locates *kaitiakitanga* within the highest source of law currently recognised within the state legal system. This is an advantage because, if it is accepted that major constitutional change is not imminent, then without this recognition Māori environmental ethics are likely to be disregarded.

Further, this sort of incorporation may have a slow catalytic effect which paves the way for greater recognition and constitutional change in the future. This may be an optimistic perspective, but some further incremental yet positive steps have occurred since the RMA was implemented in 1991. This includes the creation of the first RMA joint management agreement,<sup>202</sup> in early 2009. This is an agreement between the Taupō District Council and the Tūwharetoa Māori Trust Board that allows the parties to jointly hear resource consents and plan changes that affect multiply-owned Māori land.<sup>203</sup> This development may not be due to the reference to *kaitiakitanga*. However, it may have been influential and paved the way for this greater recognition, control and Māori autonomy over resource management. Conversely, it could produce a negative reaction and impede constitutional development. For example, David Round has stated in respect of the Māori provisions in the RMA that:

The current mania for Māori spiritual considerations will, at best, create enormous tangles and complications in decision-making, incite considerable ill-feeling, impede the freedom of land-owners to do as they please with their own property subject to that elusive bottom line, and offer considerable scope for abuse of the principle and downright corruption.<sup>204</sup>

This sort of negative response to such provisions demonstrates that not everyone favours the incorporation of Māori customary law into legislation. Therefore, it cannot necessarily be said this incorporation will ultimately lead to positive constitutional change. Where NZ legislation goes in this matter is dependent on a changeable political climate.

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<sup>202</sup> See sections 36A to 36E into the Resource Management Act 1991 (RMA).

<sup>203</sup> See Taupō District Council, n83.

<sup>204</sup> Round, n119, 51.

This form of incorporation, where a Māori concept is inserted into legislation, has both positives and negatives. Although not as extensive as is perhaps desired, Māori concepts and practices at least get some legal recognition. Further, if a reference is treated as an incorporation of Māori customary law and not merely a Māori word,<sup>205</sup> Māori will usually be able to play a role in interpreting the concept. These positive factors, however, need to be weighed against some of the drawbacks of this form, including the potential for the courts in the translation process to reduce, change and freeze the customary notion.

### **Incorporation by Extensive Codification**

The final example I will be examining is incorporation by extensive codification. This is when legislation attempts to reduce the substance of customary rules to a definitive written form. The example I will focus on is the succession of Māori land under Te Ture Whenua Māori Act 1993 (TTWMA). This Act, which according to the NZ Law Commission returned to the distinctive Māori rules of succession, codifies how Māori land can be disposed of and succeeded to.<sup>206</sup>

Under section 108 of TTWMA Māori testators can only leave Māori Freehold Land to their: children, anyone entitled to succeed under intestacy,<sup>207</sup> any other persons related by blood to the testator that are members of the *hapū* associated with the land, prior owners that are of the relevant *hapū*, and *whāngai*.<sup>208</sup> The will-maker's spouse is at most entitled to be given a life interest.<sup>209</sup> If a person dies intestate, succession is determined by statutory rules. The deceased's

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<sup>205</sup> This is not necessarily the case if an incorporation is held to just be a reference to a Māori word as opposed to an incorporation of Māori customary law. Often the legislative design will play a role in this respect, as it may specifically define the term as having to be interpreted in accordance with *tikanga* Māori (as in the case of *kaitiakitanga*).

<sup>206</sup> See NZ Law Commission, n7, 109.

<sup>207</sup> See s109 of TTWMA that includes brothers, sisters and their issue.

<sup>208</sup> In regards to *whāngai*: formally adopted children (and other relatives by adoption) can take the property just as if they were natural children. Whāngai children who are not formally adopted can only take (a) under the will of the *whāngai* parent; or (b) by order of the court, on the intestacy of the *whāngai* parent. Beyond that, an adoption by Māori custom has no standing under the Act, even where the *whāngai* child belongs to the same bloodline as the *whāngai* parent.

<sup>209</sup> See s108(4) of TTWMA.

spouse is entitled to an interest, but only until death or remarriage.<sup>210</sup> That apart, the Māori Land Court must firstly look to the children of the deceased.<sup>211</sup> If the deceased leaves no issue then the land will go to the deceased's brothers and sisters (or if they are dead, their issue).<sup>212</sup> Failing that, if there are no such persons, it is necessary to go back up the chain of title, until one finds living descendants who are closest to the dead owner.<sup>213</sup> Finally, if the Court is of the opinion that no person is primarily entitled to succeed to any beneficial freehold interest in Māori freehold land, it shall determine the persons entitled to succeed in accordance with *tikanga* Māori.<sup>214</sup> These detailed statutory rules thus represent an extensive codification, with the backstop of customary law in the unusual event that the statutory rules do not apply, as to who can succeed to Māori freehold land.

The main advantage of this statutory form is that, although there is a degree of fluidity in the law, the test is explicit and set down clearly. The effect of this is certainty, which means the rules are public, they are known, and they can therefore guide people's conduct. Part of this certainty is derived from the fact that, because of the comprehensiveness of the statutory scheme, the court does not play a large role in the interpretation process. The court's function is therefore to simply apply the statutory directions, with relatively little discretion. This results in consistency as well as alleviating the likelihood of disputes and costly litigation. This form of statutory incorporation is therefore consistent with notions inherent within the rule of law, such as accessibility, predictability, and clarity, which are some of the main advantages of the codification of legal principles in general.

One of the downsides to this comprehensive form of incorporation, however, is that the legislation may not be capable of reflecting all of the customs and subtle nuances evident within Māori customary law. As the Law Commission noted:

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<sup>210</sup> See s109(2) of TTWMA.

<sup>211</sup> See s109(1)(a) of TTWMA.

<sup>212</sup> See s109(1)(b) of TTWMA.

<sup>213</sup> See s109(1)(c) of TTWMA.

<sup>214</sup> See s114 of TTWMA.

The law governing succession to property demonstrates the difficulties of legislating to deal with the complexities of the customary system, in that the legislation attempts to follow the principles of custom law, while at the same time distorting it to fit more conveniently into the scheme of the general law.<sup>215</sup>

For example, according to traditional Māori custom, property which passes to someone by *ōbākē* (death bed declaration)<sup>216</sup> or gift would revert back to the *whānau* of the original owner on the death of the recipient.<sup>217</sup> Firstly, not only is the notion of *ōbākē* not recognized by the law as a valid means by which property can pass, but the customary notion of reversion is also not provided for. As noted by the Law Commission: the present law under TTWMA is both more restrictive and less protective than Māori custom law.<sup>218</sup> It is more restrictive because an owner of Māori freehold land is prevented from giving land away to strangers (perhaps in return for a favour), on the understanding it will return to the family after the stranger has finished with it.<sup>219</sup> It is less protective because once property is given away to a permitted recipient there is no machinery to get it back unless all the formalities of a legal trust are invoked at the time the gift is made.<sup>220</sup> This example illustrates that codification can have the effect of excluding certain facets of custom and further that it can be extraordinarily difficult to draft legislation in a manner which reflects the subtleties of customary principle. It also demonstrates one of the inherent dangers in codification, which is that the law may freeze the custom in a form which does not accurately reflect it in its entirety.

In conjunction with this, the binding character of the legislation means it effectively displaces the operation of customary practices. Unlike the reference in the RMA to *kaitiakitanga*, which could still be exercised to a limited extent outside the state legal system, the extensive codification evident in TTWMA means the customary practices pertaining to succession are confined to those included in the legislation. Codification could therefore have the effect of displacing and

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<sup>215</sup> See NZ Law Commission, n7, 75.

<sup>216</sup> Ibid.

<sup>217</sup> Ibid, 122. Also see *In re Hokimate Davis* [1925] NZLR 19, 20.

<sup>218</sup> Ibid, 123.

<sup>219</sup> Ibid.

<sup>220</sup> Ibid.



preventing a customary practice from occurring or being legally recognised. This form of incorporation is therefore a relatively weak form of legal pluralism, as once codified Māori may lose control over the content, interpretation and application of their customs.

On the other hand, although this form of incorporation has the potential to freeze and exclude parts of custom, it is also capable of reflecting large tracts of it. For example, TTWMA reflects the importance that Māori place on *whakapapa*, and the notion that land, as a *tūrangawaewae*, should be retained within the *whānau* and *hapū* and not alienated.<sup>221</sup> As recognised by Tariana Turia, “Te Ture Whenua Māori Act enables our *tūpuna* practice of honouring collective rights to be followed”.<sup>222</sup> Therefore, although this codification may not reflect or import into legislation all aspects of Māori customary law pertaining to succession, it does embrace a number of key Māori customary concepts.

There are therefore a number of positives and negatives to be balanced. In a discussion paper released in 2005, the Law Reform Commission of Western Australia described why they thought codification was an inappropriate mechanism to incorporate Aboriginal customary law into the general law of Australia.<sup>223</sup> Some of the reasons for this included: the difficulty in defining what constitutes Aboriginal law; the removal of Aboriginal autonomy over the content, application and interpretation of their customary law; the fact the courts would become the primary agencies for the application of customary law; the potential for distortion that may follow from this; and the danger that it could lead to disempowerment and erosion of the authority structures of the indigenous peoples.<sup>224</sup> These negatives are all relevant and applicable in a NZ context. However, they also need to be weighed against positives, such as the fact that large parts of the

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<sup>221</sup> For example, in the preamble it states that one of the reasons that this Act was implemented is because it was desirable to recognise that land is a *taonga tuku iho* of special significance to Māori people, and therefore this Act is to promote the retention of that land in the hands of its owners, their whānau, and their hapū.

<sup>222</sup> Third Reading of the Wills Bill Hansard (Debates) 23 August 2007 [Volume:641; Page:11456]

<sup>223</sup> Law Reform Commission of Western Australia, n112.

<sup>224</sup> Ibid.

custom can be reflected in codified legislation, and the certainty and reduction of disputes that flow from this form.

This chapter has shown that the different ways in which Māori customary law can be incorporated into legislation can be conceptualised by reference to where they sit on a spectrum of 'weak legal pluralism'. Further, each form has a number of distinct positives and negatives. Giving Māori the authority to apply a customary practice, for example, has benefits such as the custom remaining relatively 'pure' and not, at least in the first instance, being subject to the state adjudicatory system. However, the downside may be the degree of uncertainty as to the content of the rules and also that some may view this as an unacceptable form of inequality between citizens. In comparison, statutory incorporation of a single customary concept into an otherwise non-customary statutory regime has the drawback that the concept may be viewed as a general statutory term, not a wider codification of customary norms. Its interpretation may then become disengaged from a customary context. In addition, translation issues may arise when a Māori concept is used in a foreign court setting, and when English equivalents are employed by those engaged in its application. However, this form gives some recognition to Māori concepts, which may be better than nothing, and Māori may still play a role in the interpretation process. The final form examined was incorporation by extensive codification. Here the notion of certainty and the advantage of reducing disputes as to the content of the rules need to be weighed against negatives such as the freezing and distortion of custom.

An examination of these forms yields the conclusion that each form has its own distinct advantages and disadvantages. Which form is favourable is dependent on one's perspective. For example, from a viewpoint that values Māori autonomy and control over their customs, a stronger form of weak legal pluralism, such as recognition of Māori authority will be favoured. Others, however, will place weight on different considerations and may prefer weaker forms of incorporation.

## CONCLUSION

This dissertation has shown the question of whether Māori customary norms should be recognised within legislation cannot be answered categorically. Not only will the answer depend on one's perspective, as people will place different emphasis on certain positives and negatives,<sup>225</sup> but it is also contingent on the particular custom at issue and the form in which that custom is incorporated. Thus, instead of unconditionally answering this question, this dissertation has highlighted the many different arguments and aspects of this debate.

It has shown that legislative incorporation of Māori customary law perpetuates the colonial legal status quo and parliamentary sovereignty. However, if one accepts that constitutional transformations or revolutions are not imminent, the issue becomes whether it is better for Māori customs to find space within the legislative legal order, or to live outside it, in the cracks of the pervading NZ legislative scheme.

In making this decision there are some unavoidable factors that flow from incorporation that need to be weighed up. A positive is the custom will be elevated to the highest tier of law within the legal system. However, any incorporation is inevitably going to be subject to the tyranny of the parliamentary process. This is not always an advantage, particularly for Māori, as majority opinion is likely to have an impact on whether custom is recognised at all, and if so, what form this will take. The extent of this impact will differ depending on the make-up of parliament and the likely political consequences of the incorporation. Another concern is that incorporation arguably infringes upon notions of equality. However, equality has many different facets and equality arguments can be adduced both in support and in opposition to legislative recognition of Māori customary law.

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<sup>225</sup> For example people such as Moana Jackson are likely to place great weight on the perpetuation of the colonial legal system being a negative thing.

In addition to these general considerations are the distinctive positive and negative effects that flow from particular forms of incorporation. This dissertation considered three diverse forms which lie at various ends of the weak legal pluralism spectrum: incorporation by recognition of Māori authority to apply a customary norm, incorporation of a Māori word or a custom, and extensive codification.

The legislative recognition of Māori authority to apply a customary norm is a particularly attractive form of incorporation for Māori. It imports customary law largely intact, and is primarily controlled, interpreted and applied by Māori-decision makers. Although there may be some concerns about inequality and a lack of certainty there are counter-arguments to these concerns. The incorporation of a single Māori word seems to be a less attractive option for Māori. In this form there are drawbacks such as the potential for the courts in the translation process to reduce, change and freeze the customary notion. However, this needs to be weighed against the positive that although recognition may not be as extensive as desired, at least Māori concepts and practices get some recognition. Further, if a reference is treated as an incorporation of Māori customary law and not a mere Māori word, then Māori will usually play a part in the interpretation of the concept. The final form examined was extensive codification of customary law. This form of incorporation attracts benefits such as certainty and reduction of disputes. However, the disadvantage is that the legislation may freeze and distort the custom.

From a consideration of these positives and negatives it is possible to adduce various facets that require careful consideration when incorporation of Māori customary law into legislation is contemplated. One primary consideration is who is to interpret and apply the custom: just the courts, or Māori in the first instance and then the courts, or just Māori? Another consideration that has varying implications, depending on form, is the precise statutory effect of the incorporation. For example, is the practice or custom to be of general application to all NZers; what legal consequences flow from its establishment; does it have mandatory force, or is it only a

consideration? Linked to this is the issue of coverage: how extensively does the legislation describe the content of the custom? Is the legislation going to reduce the custom to a definitive written form or going to leave a degree of discretion to Māori to interpret and apply their customs? These considerations are important as various positives and negatives will attach, depending on how they are addressed.

As stated by the NZ Law Commission, “Māori themselves support the recognition of tikanga and a better relationship between tikanga and the general law”.<sup>226</sup> The pertinent question however is: what is the appropriate relationship that should be developed between the two? If this relationship is to be one where custom is incorporated into the folds of state controlled legislation, it is likely Māori will find certain forms of incorporation and circumstances more acceptable than others. For example, it is probable Māori would prefer the statute to incorporate a meaningful area of custom, not merely a fragment, where rules can be viewed within their cultural context. Further, it would be more appropriate for primary decision-makers that interpret and apply the custom to have detailed knowledge of Māori customary norms.<sup>227</sup> It can also be said incorporations that are higher on the spectrum of weak legal pluralism would generally be more suitable. However, perhaps when there is widespread agreement within Māori society as to the content of a custom then it may be acceptable that the norm is codified. It is in these circumstances, therefore, that the strongest case might be made that it is better, within our current constitutional circumstances, for Māori custom to be included rather than excluded from legislation, the highest source of law in NZ.

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<sup>226</sup> NZ Law Commission, n7, 88.

<sup>227</sup> For example, the *tangata tiaki* in the Fisheries (Kaimoana Customary Fishing) Regulations 1998, who are appointed by the *tangata whenua*, are likely to have in-depth knowledge as to the customs. In the alternative a body such as the Māori Land Court could be an appropriate body to resolve customary disputes as Judges are likely to have an understanding of *tikanga*.

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