Do New Zealand Courts Regard Tikanga Māori as a Source of Law Independent of Statutory Incorporation? Or is Anglo-inspired Common Law Still "the sole arbiter" of Justice in New Zealand?

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Introduction

Contrary to the popular assumption that we are living in a post-colonial world free from ethnocentric laws or cultural bias, there is good reason to believe that New Zealand's legal system has only undergone "partial decolonisation."[2] There is also good reason to question this status quo. New Zealand currently possesses two legal systems: "the institutionally dominant system of state law," and the long-subordinate system of tikanga Māori, which "does not sit comfortably within the Western conceptual framework of law, rights and obligations."[3] Legal positivist theory and practice has relegated tikanga to "a mechanism of social regulation" external to "the rubric of settler law."[4] Māori customary laws and values indubitably play "a relevant and meaningful role in people's lives" in a purely extra-legal realm.[5] But is this auxiliary status enough? Does it satisfy the Crown guarantees made to Māori in the Treaty of Waitangi? Moreover, given the recent judgment of the Supreme Court in *Takamore v Clarke*,[6] is this status even accurate?

The seminal text on New Zealand's legal history cites "a growing recognition of Māori customary law" as one of several "encouraging trends" in the realm of legal interaction with Māori.[7] However, last republished in 2001, this tome remains silent

[1] *Wi Parata v Bishop of Wellington* SC 1877 3 NZ Jur (NZ) 72 [*Wi Parata*] at 78 per Prendergast CJ.
[2] John Dawson "The Resistance of the New Zealand Legal System to Recognition of Māori Customary Law" (2008) 12 Journal of Pacific Law 56 at 62.
[3] Nicole Roughan "The Association of State and Indigenous Law: A Case Study in 'Legal Association'" (2009) 59 UTLJ 135 at 143.
[4] Carwyn Jones "Whakaeke I Ngā Ngaru – Riding the Waves: Māori Legal Traditions in New Zealand Public Life" in Lisa Ford and Tim Rowse (ed) *Between Indigenous and Settler Governance* (Routledge, New York, 2013) 174 at 178.
[5] Natalie Rāmirihia Coates "Me Mau Ngā Ringa Māori I Ngā Rākau A Te Pākehā? Should Māori Customary Law be Incorporated into Legislation?" (LLB (Hons) Dissertation, University of Otago, Dunedin, 2009) at 8. See also Dawson, above n 2, at 59-60, who notes that Māori customary values have continued relevance beyond the state legal system, dictating outcomes in "Māori-controlled environments, and in the use of some natural resources."
[6] *Takamore v Clarke* [2012] NZSC 116 [*Takamore*].
[7] Richard Boast "Māori and the Law, 1840-2000" in Peter Spiller, Jeremy Finn and Richard Boast (ed) *A New Zealand Legal History* (2nd ed, Brookers Wellington, 2001) 123 at 185. And yet, this chapter

on the latest precedents from New Zealand's judiciary. In *Takamore,* the Supreme Court denounced the "false antithesis" held to exist between "pure common law" and tikanga Māori,[8] with Elias CJ asserting that "Māori custom according to tikanga is… part of the values of the New Zealand common law."[9] Taking this (purportedly) potent precedent as its springboard, this dissertation will examine the fluctuating judicial stance towards Indigenous legal traditions throughout New Zealand's legal history. Chapter One delves into colonial legal history to examine the place of Māori customary law in New Zealand's constitutional canon, both in terms of statutory recognition and judicial treatment. Chapters Two and Three scrutinise how contemporary case law has incrementally elevated the legal status of tikanga Māori, with the latter chapter focusing solely on the implications of *Takamore.* Finally, Chapter Four identifies legal positivism and parliamentary sovereignty as the foundational canons of New Zealand common law, and concludes that these Anglocentric precepts are insurmountable ideological limitations to the common law recognition of tikanga Māori within New Zealand.

A Taxonomy: What is Tikanga Māori?

"An historic constraint on the discovery of Māori law has been the opinion that Māori did not have one."[10]

It is no longer tenable to deny that pre-contact Māori society was governed by law, custom, or the closest Māori equivalent, tikanga.[11] And yet, according to Moana Jackson, numerous scholars have been loath to treat this Indigenous law seriously.[12] According to Richard Boast, this unfortunate state of affairs is attributable to "the narrow positivism that has characterised not only the practice but the teaching of law in this country."[13] New Zealand's parochial Eurocentric legal stance conceives of law as "inherently linked to authoritative state institutions", and thus dismisses Māori

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was a largely land-centred study of the historical interactions between Māori and the law of the state of New Zealand.

[8] *Takamore,* above n 6, at [92].

[9] At [94].

[10] E. T. Durie "Custom Law: Address to the New Zealand Society for Legal and Social Philosophy" (1994) 24 VUWLR 325 at 326.

[11] Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2009) at 15.

[12] Moana Jackson *The Māori and the Criminal Justice System: He Whaipaanga Hou: A New Perspective* (Department of Justice, Wellington, 1988) at 35.

[13] Boast, above n 7, at 125.

customary law as a decentralised social system "more appropriately described as 'lore' and not 'law'."[14]

It has not always been thus. "Untroubled by later jurisprudential theory" emanating from Austin and Dicey,[15] discerning 19th-century emigrants to New Zealand keenly observed the minutiae of Māori society and "had no difficulty in characterising what they saw as manifestations of the phenomenon of law."[16] Edward Shortland, for example, was a celebrated author and regional sub-protector of Aborigines during his time in New Zealand, and an avid student of Māori custom.[17] Lauded by modern historians as perhaps "the first anthropologist of Māori,"[18] Shortland made the following comments on the Indigenous dedication to native history and law:[19]

> … the more important families of a tribe are in the habit of devoting one or more of their members to the study of this traditionary knowledge, as well as to that of their "tikanga" or laws, and the rites connected with their religion. Persons so educated are their books of reference, and their lawyers.

These perceptive understandings have been augmented by a burgeoning modern literature on the content of Māori law,[20] the recognition of the minute books of the Native Land Court as the "richest written source" of customary law,[21] and the partial statutory incorporation of Māori customary law.[22] Moreover, the emphatic judicial re-recognition of Māori customary law corroborates the legal relevance of tikanga Māori. So, what do these phrases actually mean?

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[14] Coates, above n 5, at 5.
[15] See John Austin *Lectures on Jurisprudence or the Philosophy of Positive Law* (3rd ed, J. Murray, London, 1869); A V Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, London, 1931).
[16] Boast, above n 7, at 126.
[17] Atholl Anderson "Shortland, Edward" (30 October 2012) The Dictionary of New Zealand Biography: Te Ara - the Encyclopedia of New Zealand <http://www.TeAra.govt.nz/en/biographies/1s11/shortland-edward>.
[18] Anderson "Shortland, Edward."
[19] Edward Shortland *The Southern Districts of New Zealand*: *A Journal* (Longman, Brown, Green and Longmans, London, 1851) at 95. See also, on the concept of Māori "legal proceedings for damages," Edward J Wakefield *Adventure in New Zealand* (John Murray, London, 1845) at 108.
[20] For an initiation into this vast topic, see Law Commission, above n 11, at chapter 3; Māmari Stephens and Mary Teresa Boyce (ed) *He Papakupu Reo Ture: A Dictionary of Māori Legal Terms* (LexisNexis NZ, Wellington, 2013); Jacinta Ruru and Joe Williams (ed) *Te Akinga: A Brookers Māori Law Treatise* (Brookers NZ, 2014) (forthcoming).
[21] Boast, above n 7, at 127.
[22] See the Resource Management Act 1991, ss 2(1) (definitions of kaitiakitanga, mana whenua, tangata whenua, taonga raranga, tauranga waka and tikanga Māori), 6(e), 7(a), 14(3)(c) and 39(2)(b).

Tikanga Māori may be simply described as "essentially the Māori way of doing things – from the very mundane to the most sacred or important fields of endeavour."[23] It embodies both "the rules maintaining order and the reasons or values underpinning those norms."[24] Far broader than positive law, these rules are united by having satisfied the threshold of tika.[25] Māori customary law comprises the body of "values, standards, principles or norms to which the Māori community generally subscribed" for self-governance.[26] While subject to regional variation, Sir Eddie Durie asserts that these "grass-roots" pan-tribal protocols were sufficiently "common" and "settled" to constitute 'law.'[27]

Sharing many foundational principles, Māori customary law and tikanga would appear to be synonymous.[28] This notion accords with the "culturalist" and "anthropological" concept of law, one which recognises "self-contained systems of social rules and processes" as valid law, irrespective of whether or not they are generated by a superordinate institutional authority.[29] Indeed, Māori in the colonial epoch would have understood tikanga to mean a formal body of law as well as moral norms, given Governor FitzRoy's widely-circulated project: William Martin CJ's 1845 translation of English law ("tikanga a te Pakeha") into Māori.[30]

However, Carwyn Jones warns against conflating tikanga with Māori customary law. Jones' *caveat lector* concedes that "Māori legal traditions are based around a system

[23] Joe Williams *He Aha Te Tikanga Māori* (paper presented to the Law Commission, 1998) at 2 as cited in Law Commission, above n 11, at 16. See also the Te Ture Whenua Māori Act, s 4, which exhaustively defines *tikanga Māori* as **"**Māori customary values and practices."
[24] Andrew Erueti "Māori Customary Law and Land Tenure: An Analysis" in Richard Boast and others *Māori Land Law* (2nd ed, LexisNexis NZ, Wellington, 2004) 41 at 41. According to the Law Commission, above n 11, at 16-17, tikanga can be spatially mapped as a spectrum – ranging from ethical values to rules of law.
[25] "Purity or correctness": Roughan, above n 3, at 143.
[26] E.T. Durie "F.W. Guest Memorial Lecture 1996: Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8 OLR 449 at 452. Eddie Durie is a former Chief Judge of the Māori Land Court, Chairman of the Waitangi Tribunal, Law Commissioner and Justice of the High Court of New Zealand.
[27] Durie, above n 10, at 340.
[28] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 12 lists whanaungatanga, manaakitanga, mana, tapu, utu, and aroha (*inter alia*); Jones, above n 4, at 174.
[29] Richard Boast "Māori Customary Law and Land Tenure" in Richard Boast and others *Māori Land Law* (LexisNexis NZ, Wellington, 2004) 21 at 22-28.
[30] William Martin *Ko Nga Tikanga a te Pakeha* (I Taia ki te Perehia Kawana, Akarana, 1845).

of tikanga" or "the right way of doing things."[31] Yet he distinguishes the two concepts because tikanga is "historically emergent" and has "adapted in the course of its encounter with settler colonialism" so as to maximise the potential for Māori autonomy.[32] I disagree with this implicit categorisation of customary law as "static and therefore, as past law," and prefer the conclusion of now retired Justice Durie, who defends the legal status of Māori customary law by analogy with the common law. If the "vibrancy of the common law is not diminished by its customary origins", why should the "vitality and flexibility" of Māori custom be thus constrained?[33] There is a certain affinity between the two legal systems, given their shared dynamism and subscription to a collection of overarching, fundamental values.[34] Māori customary law, too, is "historically emergent", and cannot be differentiated from tikanga on this basis.

There is no consensus among Māori as to the synonymity of Māori customary law and tikanga Māori, and alternative views permeate the scholarship.[35] Although the two concepts are not necessarily identical, nor are they binary opposites. Within the Māori legal system, it is unnecessary to distinguish between tikanga as legal obligations and tikanga as moral values or virtues.[36] In keeping with this broad traditional conception and the linguistic fusion recently adopted by the Supreme Court in *Takamore*,[37] the terms 'Māori customary law,' and 'tikanga Māori' are used interchangeably in this dissertation.

B Parameters

Given the existing legal,[38] historical,[39] sociological,[40] and cultural[41] scholarship on the general field of Māori customary law, I have refined my research focus to concentrate

[31] Jones, above n 4, at 174.
[32] At 175.
[33] Durie, above n 10, at 327.
[34] At 331.
[35] Durie, above n 26, at 456.
[36] Roughan, above n 3, at 143-144.
[37] *Takamore,* above n 6, at [95] per Elias CJ.
[38] See Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Oxford, 1991); Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011); Boast, above n 29.
[39] Alan Ward *A Show of Justice: Racial "Amalgamation" in Nineteenth Century New Zealand* (Auckland University Press, Auckland, 1995).

specifically on the common law treatment of tikanga Māori. This dissertation therefore will not "delve back into history to establish the pedigree of the New Zealand Parliament" in the interests of challenging or resolving "[an] assumed clash of sovereignties."[42] Nor will it dwell upon the statutory treatment of Māori customary law.[43] Furthermore, as the Law Commission has written on the content of Māori legal tradition and custom,[44] this study will not be a work of "lego-anthropology."[45] Given the 21st-century appellate authorities of *Attorney-General v Ngāti Apa*[46] and *Takamore*, what needs deeper scholarly scrutiny is the current judicial penchant for recognising Māori customary law as an integral part of the common law of New Zealand. This dissertation aims to connect New Zealand's colonial past with our post-"breakthrough era" present,[47] thereby highlighting the continuing colonisation of our legal system.

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[40] Peter Karsten *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia and New Zealand, 1600-1900* (Cambridge University Press, Cambridge, 2002). Although see Paul McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, New York, 2004) at 26-27, who critiques Karsten's "non-statist, pluralistic conception of 'law'" as "an over-inclusive, under-discriminating one that does not penetrate (or historicise) the pre-modernist view."

[41] See generally Durie, above n 26; Moana Jackson "Justice and Political Power: Reasserting Maori Legal Processes" in Kayleen M Hazelhurst (ed) *Legal Pluralism and the Colonial Legacy* (Avebury, Aldershot, England, 1995) 244; Ani Mikaere "Tikanga as the First Law of Aotearoa" (2007) Yearbook of New Zealand Jurisprudence 24.

[42] *Berkett v Tauranga District Court* [1992] 3 NZLR 206.

[43] Given New Zealand's steadfast commitment to the doctrine of parliamentary sovereignty, and the unfettered power of the legislature to dictate Māori affairs, statutory incorporation (or suppression) of Māori customary law is indubitably important. However, this subject has recently been admirably treated by Natalie Coates and is therefore beyond the ambit of my research: Coates, above n 5. See also Boast, above n 7, at 184.

[44] Law Commission, above n 11. See also David Richardson Benton, Alex Frame and Paul Meredith *A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013).

[45] This term has been adopted from Durie, above n 26, at 456. These legal-historical landscapes have been heavily tilled, and would distract (and detract) from my core research question: the true extent of legal pluralism in New Zealand.

[46] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 [*Ngāti Apa*].

[47] For an explanation of the "breakthrough era," see Paul McHugh *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, Oxford, 2011) at 3. McHugh describes the evolution of a "cross-jurisdictional meta-jurisprudence" of common law Aboriginal rights which swept through North America and Australasia, bookended by the landmark judgments of Canada's *Calder v Attorney-General of British Columbia* [1973] SCR 313 [*Calder*] and Australia's *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HCA) [*Mabo*]: McHugh at 5.

Chapter I: To What Extent was Māori Customary Law Recognised in Colonial New Zealand?

Upon 'discovery,' the colony of New Zealand was decidedly *not* a legal tabula rasa. Prior to the transplantation of English law into New Zealand, Māori society was governed by Indigenous laws and customs.[48] Crown government did not encounter "a legal vacuum, unfilled until the exercise of the constituent power."[49] Nor, upon cession of sovereignty, did Indigenous law vanish into the ether. According to the common law doctrine of continuity, customary law survived the formal annexation of 1840, provided it was not contrary to clearly expressed legislation or repugnant to universal tenets of morality.[50] While the applicability of English law to Māori tribes was fervently debated, the reality was that in many areas, English law was unknown, unenforced, and unenforceable.[51] For most of the 19th century, in certain locales, tikanga Māori was the only legal system in operation.[52] But what of its de jure status? Did the colonial courts view Māori customary law as a *sui generis* source of law, independent of statutory incorporation?

Throughout New Zealand's legal history, both specific legislation and the common law have allocated a carefully-delineated domain to Māori customary law in areas as diverse as Native title, fishing rights, and (most recently) burial customs. John Dawson thus correctly phrases the issue, in clarifying that scholars and judges are discussing the "*re*-recognition of Māori customary law,"[53] rather than the exhumation of a hitherto unrecognised legal system. In a similar vein of re-acknowledgement, this chapter will explore New Zealand's colonial legal history, and reveal the substrata of

[48] English Laws Act 1858 (UK) 21 & 22 Vict c 2, s 1. This legal injection was enabled by the alleged cession of Māori sovereignty to the Crown in the Treaty of Waitangi: see *Nireaha Tamaki v Baker* [1901] AC 561; (1901) NZPCC 371 (PC); *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308. For closer scrutiny of this assumed "fact" of legal history, see Paul Moon *The Path of the Treaty of Waitangi: Te Ara Ki Te Tiriti* (David Ling Publishing, Auckland, 2002) at 10.
[49] McHugh *Māori Magna Carta*, above n 38, at 83.
[50] Compare New Zealand Constitution Act 1852 15 & 16 Vict c 72, s 71. This provision enabled Aboriginal "laws, customs, and usages" to govern inter-Māori affairs, "so far as they are not repugnant to the general principles of humanity." These conditions also informed the doctrine of Native title.
[51] McHugh *Aboriginal Societies*, above n 40, at 180. For more on de facto tribal sovereignty and autonomy in the 19th century, see also James Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland: Auckland University Press, 1986) at 298-310; Nan Seuffert *Jurisprudence of National Identity: Kaleidoscopes of Imperialism and Globalisation from Aotearoa New Zealand* (Ashgate, Aldershot, UK, 2006) at 32.
[52] McHugh *Aboriginal Societies*, above n 40, at 180-181.
[53] Dawson, above n 2, at 62 (emphasis added).

tikanga Māori which the *arriviste* imperial authorities long upheld as governing Māori society.

A An Early Constitutional Skeleton

English laws were deemed to have been in force in New Zealand from 14 January 1840, at least "so far as applicable to the circumstances of the… colony."[54] Retrospectively, therefore, the advent of English law "pre-dated the Treaty of Waitangi, the proclamation of sovereignty and effective settlement."[55] However, the English Laws Act 1858 did not explicitly displace Māori law or decree that only English law applied. Indeed, now retired Justice Durie asserts that if its usage would "prejudice existing Māori interests arising by Māori law," English law was arguably inapplicable to colonial circumstances.[56] This was apparently the stance adopted by the New Zealand Supreme Court in *Baldick v Jackson,* where Stout CJ held that the Crown's right to recover whale carcasses was inapplicable to the circumstances of the colony in view of Māori custom and the Treaty's assumption that "[Māori] fishing was not to be interfered with."[57] This precedent suggests that a New Zealand statute was not necessary to preserve this customary whaling right.[58]

To ask precisely *when* Māori understood this Anglo-import legal system is to assume either that "Māori had blank minds awaiting intelligence, or were willing to jettison their beliefs for an alternative regime."[59] The annals of history, however, reveal otherwise. Māori signatories of the Treaty of Waitangi were not amenable to the exclusive imposition of English law, but were adamant that their own laws would be respected.[60] Nor had the Treaty anticipated "a mono-legal regime."[61] Indeed, the covenant in the Māori version of *te Tiriti* is "more properly understood" as establishing a bipolar "power-sharing" arrangement, enabling Māori retention of

[54] English Laws Act, s 1.
[55] Durie, above n 26, at 459.
[56] At 460.
[57] *Baldick v Jackson* (1910) 30 NZLR 343 at 345.
[58] *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC) [*Te Weehi*] at 689 per Williamson J. However, *Baldick v Jackson* stands in stark contrast to Stout CJ's subsequent ruling in *Waipapakura v Hempton* (1914) 33 NZLR 1065, which denied the existence of Māori customary rights without prior statutory conferral.
[59] Durie, above n 26, at 456.
[60] At 460.
[61] At 459.

"parallel control over Māori land and people."[62] Even if the second article guarantee of *te tino rangatiratanga* was "no more than an assurance that the Chiefs' cession of sovereignty would not displace their customary law," qualified legal pluralism was "an expected outcome" of British sovereignty.[63]

This interpretation is corroborated by initial Colonial Office policy, which denied any intention of ruling over Māori,[64] and recognised continued Indigenous self-governance.[65] Moreover, the "fourth article" of the Treaty conveyed Governor Hobson's verbal assurance to Māori that "[the] Queen will not interfere with your native laws or customs."[66] According to the doyenne of Treaty historiography, Dame Claudia Orange, this "verbal commitment" would have ultimately "amounted to very little."[67] Durie, however, argues that in treaties entered with Indigenous peoples of oral tradition, influential American precedent affirms that verbal and written promises are to be afforded equal weight.[68] Thus the Treaty cannot be upheld as the progenitor of a purely English law in New Zealand, but rather, as "authority for the proposition that the law of the country would have its source in two streams."[69]

B Official Colonial Policy

Once this "so-called treaty of cession" had established Crown *imperium,*[70] colonial officials were faced with an immediate quandary: to what extent were Māori governed by English law? Given the state's dearth of resources, and the great imparity of settler and Māori populations, the question of jurisdiction and enforcement was largely "a theoretical problem."[71] Nevertheless, this issue divided official opinion. Acting-Governor Edward Shortland believed that as the nation was British territory,

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[62] Seuffert *Jurisprudence of National Identity*, above n 51, at 31.
[63] McHugh *Māori Magna Carta,* above n 38, at 86.
[64] Seuffert *Jurisprudence of National Identity*, above n 51, at 31.
[65] Alex Frame "Colonising Attitudes Towards Māori Custom" [1981] NZLJ 105 at 105-109.
[66] Boast, above n 7, at 132.
[67] Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1997) at 53. Compare Law Commission, above n 11, at 72-74 (and citations therein).
[68] Durie, above n 26, at 460.
[69] At 461.
[70] Jacinta Ruru "Asserting the Doctrine of Discovery in Aotearoa New Zealand: 1840-1960s" in Robert J Miller, Jacinta Ruru, Larissa Behrendt and Tracey Lindberg *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, New York, 2010) 207 at 207.
[71] Boast, above n 7, at 136.

all Māori were subject to English law.[72] Conversely, Attorney-General William Swainson believed that Māori who had not signed the Treaty were independent of the Crown.[73] In June 1843, New Zealand Company settlers and Ngāti Toa clashed over disputed land in the fertile Wairau Valley.[74] Hostilities and property-destruction degenerated into internecine fighting, resulted in twenty-six fatalities, and left Māori-European relations "badly shaken."[75] Following the Wairau affray, Swainson declared the "now well known" fact that even Māori signatories:[76]

> … had not the most remote intention of giving up their rights and powers of dealing, according to their own laws and customs, with the members of their own tribes, or of consenting to be dealt with in all cases according to our laws.

Reminiscent of British Canadian policy during the Royal Proclamation era, Swainson's "Marshall-like notion of a subsisting and limited tribal sovereignty" was ultimately vetoed by London.[77] Spurred on by the humanitarian lobby in Westminster, the Colonial Office maintained that Māori interests would be best protected by Crown sovereignty and its handmaiden: English law.[78]

George Clarke, Chief Protector of Aborigines, and James Stephen, Colonial Under-Secretary, epitomised such paternalistic 'beneficence'. Clarke urged the incremental extension of British law by convincing Māori chiefs of its superiority.[79] Stephen asserted that English law ought to be *selectively* applied, unhindered by either "the spirit of legal pedantry" or "the contempt and aversion with which the European race

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[72] Boast, above n 7, at 137.
[73] McHugh *Aboriginal Societies*, above n 40, at 168.
[74] Ministry for Culture and Heritage "The Wairau Incident" (20 December 2012) NZHistory Online <http://www.nzhistory.net.nz/wairau-incident>.
[75] Mark Derby "Māori–Pākehā relations -Military conflicts" (15 November 2012) Te Ara - The Encyclopedia of New Zealand <http://www.TeAra.govt.nz/en/artwork/28561/wairau-affray-1843>.
[76] Letter from William Swainson (Attorney-General) to Edward Shortland (Acting Governor) regarding whether Māori chiefs could be deemed to have given their "intelligent consent" to the Treaty of Waitangi, and thus be governed solely by English law (27 December 1847) as cited in McHugh *Aboriginal Societies*, above n 40, at 169.
[77] McHugh *Aboriginal Societies*, above n 40, at 169. The eponymous "Marshall" notion refers to the celebrated "Indian trilogy" of *Johnson v McIntosh* 21 US 543 (1823); *Cherokee Nation v Georgia* 30 US 1 (1831); and *Worcester v Georgia* 31 US 515 (1832). Issued in the latter part of Marshall's tenure as Chief Justice of the Supreme Court of the United States, these three precedents have been beatified for their endorsement of "tribal quasi-sovereignty," and touted as the legal prototype for dealing with Indigenous customs in other jurisdictions: Peter D'Errico "John Marshall: Indian Lover?" (2000) 39 Journal of the West <http://www.umass.edu/legal/derrico/marshall_jow.html>.
[78] McHugh *Aboriginal Societies*, above n 40, at 168-169.
[79] Boast, above n 7, at 137.

everywhere regard the Black races."[80] Stephen affirmed that English law is introduced to a colony only to the extent that local circumstances allow, and that Māori should abide by their own law.[81]

This brief survey of colonial opinion reveals that, in the colony's formative years, no official consensus existed as to what the legal status of tikanga Māori *ought* to be. For many settler bureaucrats, "a legal presumption arose that when English law came in, Māori law was displaced unless… specifically provided for."[82] Popular historians, too, have long clung to this myth.[83] However, the common law doctine of continuity presumed the survival of Māori customary law, subject to certain conditions.

C Continuity of Indigenous Legal Traditions

Upon the Crown's acquisition of sovereignty, the status of Indigenous customary law was initially contingent on the common law. Faced with two possible responses, either the *ipso jure* truncation or conditional continuity of the Indigenous legal regime, the common law opted for the latter. The doctrine of continuity recognised that "British sovereignty… *of itself* did not make legal order from chaos, but rather, extended some legal recognition to the pre-existing tribal system of government and law."[84] Paul McHugh asserts that this mandate has "a certain inevitability," as continuity is "a deep-seated trait of human nature."[85] Individuals do not switch their allegiance and adherence to legal systems quite so easily.

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[80] James Stephen, Minute (26 February 1846) as cited in McHugh *Māori Magna Carta*, above n 38, at 93.
[81] Letter from James Stephen (Colonial Under-Secretary) to George Hope (Parliamentary Under-Secretary) regarding the conditional continuity of Māori laws and customs (28 December 1843) as cited in McHugh *Māori Magna Carta*, above n 38, at 93. However, Stephen's codicil excluded the recognition of "such customs… as are abhorrent from the universal laws of God." Note the similarities between this terminology and the phrasing of the English Laws Act, s 1.
[82] Durie, above n 26, at 459.
[83] See, for example, N.A. Foden *New Zealand Legal History (1642-1842)* (Sweet & Maxwell, Wellington, 1965) at 24-25 and 179-190; Ward, above n 39; Peter Adams *Fatal Necessity: British Intervention in New Zealand, 1830-1847* (Auckland University Press, Auckland, 1977) at chapter 7.
[84] McHugh *Māori Magna Carta,* above n 38, at 83.
[85] At 84. The immediate suspension of the native legal system would therefore be a "surprising" outcome of colonisation.

In the early 17th century, *The Case of Tanistry*[86] settled the legal impact of British sovereignty upon the pre-existing system of Irish customary law (*brehon*). The court held that indigenous laws survived sovereignty, provided they satisfied requirements of reasonableness, certainty, immemorial usage and compatibility with the royal prerogative.[87] In the same year, Sir Edward Coke's report of *Calvin's Case* asserted that "[the] laws of a conquered Christian nation survived, but the laws of an infidel nation were abrogated *ipso jure*."[88] Before the settlement of New Zealand, however, Lord Mansfield had denounced Coke's "strange, extrajudicial opinion,"[89] clarifying that Indigenous laws deserved the same presumption of continuity as established in *The Case of Tanistry*.[90]

By the mid-19th century, then, the common law unequivocally stated that the importation of English law to a colony did not automatically displace pre-existing laws. When the Crown acquired territory governed by a highly developed, documented legal system, "the need to 'modify' the local law *(lex loci)* was non-existent."[91] Meanwhile, in tribal territories, a *modified* continuity enabled the Crown to assume a protective, intermediary role between settler and Indigenous communities.[92] Although "legal pluralism of a character approaching a measure of rangatiratanga never eventuated," Māori customary law retained its pre-contact status (at least in proprietary and civil matters).[93] In the colonial period, tikanga Māori could be ousted only by Act of Parliament.

D Legislating Custom: The 1840s

[86] *The Case of Tanistry* (1608) Davies 28, 80 ER 516 (KB).
[87] McHugh *Māori Magna Carta,* above n 38, at 87.
[88] *Calvin's Case* (1608) 7 Co Rep 1a, 77 ER 377 (Comm Pleas).
[89] *Campbell v Hall* (1744) 1 Cowp 204, 98 ER 1045, Lofft 655, 98 ER 848 (KB). Although Lord Mansfield's 'incontrovertible' propositions referred specifically to conquered territories, they pertain to all colonial acquisitions, whether by conquest, cession, settlement, or usurpation.
[90] McHugh *Māori Magna Carta,* above n 38, at 89. See the summary of these stringent requirements for legal recognition of native custom at *Halsbury's Laws of England* (5th ed, 2012, online ed) vol 32 Custom and Usage at [6].
[91] McHugh *Māori Magna Carta,* above n 38, at 86. A prime example of such unqualified continuity is the Québecois French seigneurial system.
[92] At 86.
[93] At 94.

But legislation was not solely a mechanism of Indigenous legal dispossession. Indeed, several notable statutes from the early colonial era explicitly recognised and affirmed the continued existence and effect of Māori law-ways.

The Native Exemption Ordinance of 1844, Governor FitzRoy's controversial solution to the Wairau Affray, deprived police magistrates of the power to arrest Māori for criminal offences committed outside the limits of a town.[94] Moreover, if the dispute involved Māori parties only, the assent of the Protector of Aborigines was a prerequisite for an arrest warrant. The Protector would then communicate with the local chiefs, who would receive compensation for acceding to criminal proceedings.[95] While settlers were hostile to this ordinance, Māori chiefs "quite properly saw it as reinforcing rather than challenging their mana. To them it signified their exception rather than subjection to English law."[96] By making criminal law enforcement within Māori society contingent upon the permission of rangatira, this law implicitly recognised the emergence of discrete, parallel nations. Exempting Māori from the application of colonial laws "positioned Māori outside the jurisdictional boundaries determining the nation," thereby allowing Māori customary law a carefully delineated sphere of operation.[97]

When Governor Grey replaced the increasingly unpopular FitzRoy in 1845, he immediately implemented a programme for "bringing Māori directly under the subjection of British law."[98] This involved repealing the Native Exemption Ordinance, abolishing the Protectorate of Aborigines, and introducing coercive armed policing.[99] Governor Grey also successfully lobbied the Westminster Parliament to pass the New Zealand Constitution Act 1846, which proposed that certain districts be "set apart" in which "native laws, customs, or usages should be so observed"[100] and enforced in relation to Māori dealings *inter se*.[101] This relaxation of the rigid application of imperial legislation was an attempt to incorporate customary law into

[94] Native Exemption Ordinance 1844 7 Vict 18, cl 2, 6. The offences of rape and murder were excluded from the ambit of this Ordinance.
[95] Clauses 4-5.
[96] McHugh *Aboriginal Societies,* above n 40, at 170.
[97] Seuffert *Jurisprudence of National Identity*, above n 51, at 32.
[98] Boast, above n 7, at 138.
[99] At 138.
[100] New Zealand Government Act 1846 (UK) 9 & 10 Vict c 103, ss 2 and 11.
[101] Section 10. In its aim, this Act is not markedly different from FitzRoy's 1844 Ordinance.

the colonial legal system. Evidently, the laws of New Zealand in 1846 included Māori "laws, customs and usages." However, the Act was suspended, Grey's self-professed "modifications of the British law"[102] were abandoned, and the districts were never set aside.[103]

Much like its legislative forebears, the New Zealand Constitution Act 1852 enabled a strictly delineated bijuridicalism which was never actually implemented.[104] Section 73 enabled the Governor to proclaim districts in which Māori law would continue to prevail, and s 71 read:[105]

> It may be expedient that the laws, customs, and usages of the aboriginal (or Māori) inhabitants of New Zealand… should for the present be maintained for the government of themselves, in all their relations to and dealings with each other.

Effectively the statutory equivalent of the common law doctrine of continuity, this provision remained in force until the passage of the Constitution Act 1986. Although this power was never used, its recognition of residual tribal jurisdiction envisaged "a Marshall-like approach towards the chiefs' authority and the internal viability of Māori custom within specified areas."[106]

Throughout the 1850s, Māori laws were extinguished for their contravention of "civilised practices,"[107] and the 1860s saw "the shape and the boundaries of the nation violently contested" in the New Zealand Wars.[108] In the aftermath of these tumultuous decades, the applicability of British law to Māori remained unclear. The Native Rights Act 1865 expressed this contemporary uncertainty in its preamble, professing to be: "[an] Act in response to doubts about whether the colonial courts have jurisdiction in all cases touching the persons and property of the Māori people." The

[102] Letter from Governor George Grey to the Legislative Council (10 October 1846) as cited in McHugh *Aboriginal Societies,* above n 40, at 170.
[103] Philip A. Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Company, Sydney, 1993) at 82-83.
[104] McHugh *Aboriginal Societies*, above n 40, at 267.
[105] New Zealand Constitution Act 1852 (UK) 15 & 16 Vict c 72, s 71.
[106] McHugh *Aboriginal Societies,* above n 40, at 170.
[107] Frame, above n 65, at 107-109.
[108] Seuffert *Jurisprudence of National Identity*, above n 51, at 35.

Act "anxiously declared" the existence of such a jurisdiction over Māori.[109] Furthermore, where Native title had not been extinguished, the Native Land Courts were empowered to determine property interests according to "the Ancient Custom and Usage of the Maori people."[110]

This early recognition of Maori law proved to be ephemeral. English legal institutions were widely conceived of as "innately superior," and legal assimilation was touted as securing "the best interests of Maori."[111] Māori customary law was therefore systematically displaced by niche statutes,[112] extensive statutory regimes,[113] and judicial decisions.

E The Volte-Face of the Common Law

Global empirical studies have altered international thinking as to the existence of Indigenous legal systems,[114] but those interested in New Zealand "may be over-awed by the… weighty views from the general courts at about the turn of the century which did not conceive of any Māori polity or law."[115] Such wilful blindness did not exist *ab initio*. From the tacit respect for Māori customary law in *R v Symonds*,[116] through its blunt rejection in *Wi Parata v Bishop of Wellington,*[117] and the Privy Council's (unheeded) countermand of such a rejection in *Nireaha Tamaki v Baker,*[118] the colonial course of the common law has been far from smooth. Indeed, these precedents are united only by their staunch ideological commitments to the Doctrine

[109] At 35.
[110] Native Rights Act 1865 29 Vict c 11, s 4.
[111] Coates, above n 5, at 12. Indeed, other 'Native' legislation of the early 1860s explicitly stratified English and Māori legal systems (intending to elevate the former). For a prime example, see the preamble to the Native Lands Act 1862, which was intended to "greatly promote… the advancement and civilization of the Natives" by having their proprietary rights "assimilated as nearly as possible to the ownership of land according to British law." Similarly, the preamble to the Native Land Act 1865 urges the consolidation of colonial land law, encourages "the extinction of such [Māori] proprietary customs," and aims "to provide for the conversion of such modes of ownership into titles derived from the Crown."
[112] See the Tohunga Suppression Act 1907.
[113] Coates, above n 5, at 13. Coates cites the criminal code as an example of general-level assimilation.
[114] See generally the scholarship of John Borrows on Canada's First Nations, particularly "Indigenous Legal Traditions in Canada" (Report for the Law Commission of Canada, Ottawa, 2006).
[115] Durie, above n 10, at 326.
[116] *R v Symonds* (1847) NZPCC 387.
[117] *Wi Parata*, above n 1.
[118] *Nireaha Tamaki v Baker,* above n 48.

of Discovery.[119] Poring over these "constitutional moment cases"[120] will help us to ascertain the erratic trajectory of judicial recognition of Māori legal traditions – regardless of their incorporation into statute law.

By 1844, the colonial project was mired in a political and economic crisis. Unable to purchase land and facilitate sales, the impecunious Treasury was besieged by the lobbying of land-hungry colonists and eager Māori vendors, both frustrated by the Crown's pre-emptive right to purchase land.[121] Governor FitzRoy's solution was to waive pre-emption in March 1844, allowing direct sales to settlers in exchange for a governmental fee.[122] But the Colonial Office baulked at FitzRoy's second waiver of October 1844, which "completely destroyed the economic purpose of pre-emption" by reducing this fee to a penny per acre.[123] Thus when Governor Grey succeeded FitzRoy in November 1845, he was firmly instructed to restore the right of pre-emption.[124] This reversal of policy suddenly brought into doubt all titles issued under the purported waiver.

Ostensibly protecting Māori from the unlawful expropriation of their lands, *R v Symonds* assimilated Māori land tenure to the English property law system. *Symonds* was a test case in which Governor Grey orchestrated a challenge to a title effected under FitzRoy's waiver, in order to ascertain the (in)validity of such sales.[125] Significantly, there were no Māori litigants involved; this was a dispute between settlers. The issue was whether McIntosh had acquired bona fide title directly from the Māori vendors (as endorsed by a certificate issued under FitzRoy's purported waiver) and whether such purchase invalidated the Crown's subsequent grant of title to Symonds.

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[119] For evidence of this 'golden thread,' see Ruru, above n 70, at 215 and 221, referring to *Symonds* as the first New Zealand case to rely explicitly on Doctrine of Discovery ideology and *Wi Parata* as "New Zealand's paramount Discovery case."
[120] I am indebted to my supervisor, Jacinta Ruru, for suggesting this neat phrase.
[121] Seuffert *Jurisprudence of National Identity*, above n 51, at 18; Orange, above n 67, at 103-105.
[122] This "ten shillings per acre" waiver was often euphemistically referred to as FitzRoy's "experiment." See Michael Wordsworth Standish "FITZROY, Robert" (23 April 2009) Te Ara - the Encyclopedia of New Zealand <http://www.TeAra.govt.nz/en/1966/fitzroy-robert>.
[123] Orange, above n 67, at 104.
[124] At 104.
[125] Seuffert *Jurisprudence of National Identity*, above n 51, 19.

The Supreme Court held that the Crown's right of pre-emption could not be waived, as "the Queen is the exclusive source of title."[126] In dispensing with this pre-emptive right, FitzRoy had breached a fundamental doctrine of English common law. His Proclamations were deemed to be ultra vires, therefore the grounds for the writ of *scire facias* were not satisfied and Symonds' title was upheld.[127] In potent obiter on Native title, Chapman J noted that:[128]

> … it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers.

Thus the Crown's paramount title was burdened by the customary property rights of Māori owners. In the interests of Māori protectionism "and for the sake of humanity," Native title could be lawfully extinguished - but only by the Queen.[129] Implicitly, this "thin consensus" as to the presence and vulnerability of Native title also involved "recognition in these processes of 'rights' to be quieted or removed."[130] Māori customary rights, and (of necessity) the laws which girded them, were "entitled to be respected" until such time as the Crown saw fit to unequivocally extinguish them.

Symonds aligned New Zealand law with "a broader, trans-oceanic narrative" of Indigenous rights to Native title, by distilling and formally adopting "a jurisprudential literature minted and honed in the United States" as relevant to Crown-Māori relations.[131] Much like the celebrated judgments of Marshall's Court, *Symonds* has been the subject of considerable legal hagiography.[132] Such 'beneficent' recognition, however, proved short-lived. Three decades later, the Supreme Court proceeded to question and undermine the very existence of Māori customary law: could Māori behavioural norms and customs constitute 'law'? Did Māori even properly constitute

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[126] *R v Symonds,* above n 116, at 390.
[127] *R v Symonds,* above n 116, at 398-398.
[128] At 390.
[129] At 390. At 391, Chapman J rationalised pre-emption as being "founded on the largest humanity" because it protected Māori from mass expropriation, and the "evil consequences of the intercourse to which we [settlers] have subjected them."
[130] Hickford *Lords of the Land,* above n 38, at 202.
[131] At 203. For corroboration of his stance on Native title, Chapman J relied upon *Cherokee Nation v State of Georgia*, above n 77, as cited in *Symonds*, above n 116, at 390.
[132] McHugh *Aboriginal Societies*, above n 40, at 41 writes that *Symonds* has been canonised in the revisionist historiography of common law Aboriginal rights, due to the legal positivists' preoccupation with precedent and the legal historians' "presentist trawling of the pre-modern period for modernist insignia of law's presence."

a body politic? By answering both questions in the negative, the common law nullified any legal recognition of tikanga Māori.

F The Epitome of Legal Notoriety: "a simple nullity"[133]

A-contextually, this phrase appears relatively unobjectionable. When applied to the Treaty of Waitangi, however, these three simple words have generated such "an avalanche of adverse criticism from a multitude of commentators"[134] that legal historian Grant Morris has identified *Wi Parata* as "the most notorious in New Zealand's history."[135] Condemned for epitomising "the pinnacle of free trade imperialism,"[136] judicial ethnocentrism and Treaty-repudiation, this case is equally censured for its rejection of Māori customary law.[137]

The Ngati Toa tribe had gifted land to the Anglican Church on trust, for the purpose of erecting a school for Ngati Toa children. Given the Crown's exclusive right of extinguishing Native title, this deed itself could not have alienated the relevant land. The issue in *Wi Parata* was whether the Crown grant to the Bishop of Wellington, allegedly made without the knowledge or consent of Ngati Toa, was a voidable "fraud upon the donors."[138] Conflating *imperium* and *dominium*,[139] the Supreme Court surpassed the common law doctrine of subsisting (albeit limited) tribal sovereignty, and "relied on a new version of historical events" to deny Māori government, property rights, and customary law.[140] *Wi Parata* held that Māori-Crown transactions were "to be regarded as acts of State," and were therefore non-justiciable.[141] This

[133] *Wi Parata*, above n 1, at 78.
[134] For a substantial inventory of these critiques, see David V. Williams *A Simple Nullity? The* Wi Parata *Case in New Zealand Law & History* (Auckland University Press, Auckland, 2011) at 2.
[135] Grant Morris "James Prendergast and the Treaty of Waitangi: Judicial Attitudes to the Treaty During the Latter Half of the Nineteenth Century" (2004) 35 VUWLR 117.
[136] Seuffert *Jurisprudence of National Identity*, above n 51, at 133.
[137] See the judgment of Elias CJ in *Ngāti Apa*, above n 46.
[138] *Wi Parata*, above n 1, at 76.
[139] On the dichotomy between *imperium* (sovereignty) and *dominium* (absolute proprietary rights), see *Ngāti Apa,* above n 46, at [26] per Elias CJ.
[140] Ruru, above n 70, at 219. Although Prendergast CJ is officially listed as having authored this judgment, Richmond J may well have been his ghost-writer. After traversing the archival evidence relating to *Wi Parata*, David Williams convincingly concludes that "it is more than plausible" (even "highly likely") that Richmond J wrote the infamous judgement: see Williams, above n 134, at 150. Therefore, rather than citing (or indicting) Prendergast CJ, I have chosen to attribute the *Wi Parata* judgment to the Supreme Court *in banco.*
[141] *Wi Parata*, above n 1, at 79.

oxymoronic legal stance portrayed Māori "as though they were engaging in *fact* with the Crown as sovereign-to-sovereign whilst simultaneously denying them that *legal* status."[142] Immune from judicial review, the Crown grant was upheld.

In keeping with contemporary European notions of nationhood, and legal positivist concepts of law,[143] the Supreme Court justified this conclusion by asserting that, upon colonisation, "the aborigines were found without any kind of civil government, or any settled system of law."[144] Indeed, the court hypothesised, if a cognisable legal system *had* existed, "the British Government would surely have provided for its recognition."[145] But in New Zealand, "the old law of the country" need not be administered to any extent, because:[146]

> … in the case of primitive barbarians, the supreme executive Government must acquit itself… of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice.

This negation of Māori customary law was not only inaccurate, but also directly contravened statutory directions to the Native Land Court, which made explicit reference to the "Ancient Custom and Usage of the Māori people."[147] The judgment discussed the Native Rights Act 1865 with some perplexity, declaring that the Act spoke "as if some such body of customary law did in reality exist." Yet, according to the court, "no such body of law existed."[148] This obiter "literally re-members" New Zealand's legal history by recreating "the nation as one in which Māori laws and customs never existed."[149]

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[142] McHugh *Aboriginal Societies,* above n 40, at 172. According to McHugh, this paradoxical position breached the common law rule that there could be no act of State by the Crown against its own subjects: *Entick v Carrington* (1765) 19 St Tr 1030, 95 ER 807 (KB).
[143] Williams, above n 134, at 165-166. For an example of British ideologies that coloured judicial opinion, see *Wi Parata*, above n 1, at 77. The court placed significant reliance upon Lord Normanby's qualified recognition of Māori property rights in his 1839 Instructions to Hobson, citing in particular his assessment of the Māori as: "a people composed of numerous, dispersed, and petty tribes… incompetent to act, or even to deliberate, in concert."
[144] *Wi Parata*, above n 1, at 77.
[145] At 78.
[146] At 78. As McHugh noted in *Aboriginal Societies*, above n 40, at 125, this quote is "an unattributed paraphrase" of Johnson J's judgment in *Cherokee Nation v Georgia*, above n 77, at 29: "In the exercise of sovereign right, the sovereign is sole arbiter of his own justice."
[147] Native Rights Act 1865, s 3.
[148] *Wi Parata*, above n 1, at 79.
[149] Seuffert *Jurisprudence of National Identity*, above n 51, at 36.

For some commentators, this circumvention of the 1865 Act is the most objectionable element of the case.[150] Effectively, the judgment sidesteps the statutory incorporation of Māori customary law by holding that the Crown is not bound by the statute, as it is not named therein.[151] Beyond this "technical way out," Williams is shocked that two judges of the Supreme Court could blithely suggest that "a phrase in a statute cannot call what is non-existent into being." [152] Williams suggests that *Wi Parata* characterises "a blatant refusal by judges to apply a law made by the sovereign power… that they just happen not to like."[153] Indeed, the hostile attitude of domestic courts to subsequent Māori claims stood in "stark contrast to the more sympathetic approach of the Privy Council."[154]

G A More Sympathetic Approach?

In *Nireaha Tamaki v Baker*, the Privy Council overturned the *Wi Parata* reasoning, as followed by the New Zealand Court of Appeal,[155] that "there is no customary law of the Maoris [sic] of which the Courts of law can take cognizance."[156] Lord Davey, delivering the judgment on behalf of their Lordships, held that "this argument goes too far, and that it is rather late in the day for such an argument to be addressed in a New Zealand Court."[157] Ultimately, their Lordships' reversal of the Court of Appeal decision hinged on statutory recognition of Native title, not the common law recognition of Māori customary law.[158] The Privy Council held that the Native Rights Act 1865 must be interpreted so as to recognise Native title until clear extinguishment occurred.[159] To bypass ss 3 and 4 of the Act would be to breach "the duty of the

[150] Williams, above n 134, at 172.
[151] *Wi Parata*, above n 1, at 80.
[152] At 79.
[153] Williams, above n 134, at 172. To indulge in a little hypothetical legal history, the first Chief Justice of New Zealand would have roundly rejected the legal fiction of *Wi Parata.* Martin CJ often referred to "native title" and regarded Māori customary land-use rights as akin to the separate regimes of Northern American Indian and Scots property law, recognising that "under the single sovereignty of the Queen of England there are many systems of law": William Martin "Observations on the Proposal to take Native Lands under an Act of the Assembly" [1864] 1 AJHR E2c at 6 as cited in Peter McKenzie "New Zealand's First Chief Justice: The Rule of Law and the Treaty" (2012) 43 VUWLR 207 at 228. However, Martin CJ's stance (hypothetical or not) was not representative of Antipodean opinion.
[154] McHugh *Māori Magna Carta*, above n 38, at 95.
[155] *Nireaha Tamaki v Baker* (1894) 12 NZLR 482 (CA).
[156] *Nireaha Tamaki v Baker*, above n 48, at 382.
[157] At 382.
[158] Ruru, above n 70, at 222.
[159] *Nireaha Tamaki v Baker*, above n 48, at 382-383.

Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage."[160] *Nireaha Tamaki* is significant for its reaffirmation of the legal relevance of Māori customary law.[161]

However, their Lordships also declared that they had "no reason to doubt the correctness" of *Wi Parata's* outcome, since "the issue of a Crown grant implies a declaration by the Crown that native title has been extinguished."[162] Thus, between 1877 and 1986, the only criticism of this judgment related to a "non-crucial" element of its reasoning.[163] *Wi Parata* was upheld as good law for over a century. As recently as 1963, the Court of Appeal cited *Wi Parata* as "weighty authority" for the Solictor-General's submissions on the extinguishment of Māori customary rights over foreshore land.[164] Subsequent judicial opinions therefore assumed that English law entered a legal vacuum in New Zealand, ameliorating an uncivilised Aboriginal society. Such an assumption was not only unsubstantiated, but unnecessary. As now retired Justice Durie has noted, if Māori law was found inadequate for the administrative needs of the colony, "one had only to legislate for English law to apply to the extent necessary."[165]

Yet Boast alleges that the "scanty" subsequent case law has preferred the Privy Council's *Nireaha Tamaki* approach over *Wi Parata,* claiming that it is "not so much the courts that have been hostile to Māori customary law as politicians. The common law has always been, in a sense, pluralist."[166] While this may resonate with modern liberal thought, such a presentist assertion ignores the contemporary influence of *Wi Parata* and the long shadow it cast. The common law's enduring denial of Māori customary law was one of the most damaging conduits for its displacement from the

[160] At 382.
[161] The aftermath of this lofty authority is also intriguing as an unprecedented and unparalleled example of the New Zealand judiciary "publicly avowing its disapproval of a superior tribunal": Robin Cooke "The Nineteenth Century Chief Justices" in *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (Reed, Wellington, 1969) 36 at 46.
[162] *Nireaha Tamaki v Baker* above n 48, at 383-384.
[163] Williams above n 134, at 226.
[164] *Re the Ninety-Mile Beach* [1963] NZLR 461 (CA) at 468 per North J; at 475, T.A. Gresson J approved the *Wi Parata* assessment of the Government as "sole arbiter of its own justice."
[165] Durie, above n 26, at 459. Arguably, this was the intended effect of the English Laws Act 1858.
[166] Boast, above n 7, at 129.

state legal system.[167] As my next chapter will demonstrate, however, the most recent judicial expressions on this issue indicate that tikanga Māori is properly viewed as a strand of legal theory (albeit a defeasible one) woven into New Zealand's common law.

[167] Dawson, above n 2, at 58. See 59-60 for Dawson's tabulation of the primary routes through which Māori customary law had been almost entirely supplanted by 1900.

Chapter II: Judicial Treatment of Māori Customary Law in the "Breakthrough Era" and Beyond

"The Common Law shows an assimilative power which, to all appearance, grows by what it feeds on."[168]

As a corollary of the "Breakthrough Era" in the field of Law and Indigenous Peoples, there has been significant political recognition of the need for Māori self-government and self-determination.[169] To some extent, these desires have been satiated by legislation which sought to give Indigenous legal practice a place within the state's legal system.[170] However, in New Zealand, "the accommodation of indigenous peoples within the state has resulted directly from judicial prompting."[171] Through the lens of three case studies, *Te Weehi v Regional Fisheries Officer,*[172] *Ngāti Apa*, and *Takamore,* the following two chapters examine how contemporary judicial attitudes have augmented the legal status of autochthonous customary law. As the most recent authority on the status of tikanga Māori, *Takamore* merits separate treatment and is considered in Chapter Three.

A Te Weehi: *Non-Territorial Customary Rights*

Exhibiting a certain "common law adventurousness" in its novel use of the doctrine of Native title,[173] *Te Weehi* marked a pivotal development in the judicial recognition of Māori customary law. By simply quashing a conviction under the Fisheries Act 1983, this case injected "a legal pluralism" directly into New Zealand's judicial system "without the aid of any ushering statute."[174]

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[168] Frederick Pollock *The Genius of the Common Law* (AMS Press, New York, 1967) at 77.
[169] Roughan, above n 3, at 145.
[170] Dawson, above n 2, at 57, alludes to the Resource Management Act as exemplifying the weak statutory incorporation of Māori concerns. See also the Treaty of Waitangi Act 1975, which established the Waitangi Tribunal to hear grievances and recommend settlements arising under the Treaty. The quasi-judicial work of the Tribunal has generated more detailed attention to tikanga Māori.
[171] E.T. Durie "The Rule of Law, Biculturalism and Multiculturalism" (2005) 13 Waikato L Rev 41 at 43. Durie describes this "classic judge-made constitutional development" as occurring also in Australia, Canada and the United States.
[172] *Te Weehi,* above n 58.
[173] McHugh *Aboriginal Societies* above n 40, at 422.
[174] McHugh *Māori Magna Carta,* above n 38, at 131.

In 1984, Te Weehi was apprehended by fisheries officers at Motunau Beach and subsequently charged with possession of undersized paua and behaving in a threatening manner towards those officers.[175] A Māori of Ngati Porou descent, Te Weehi challenged the application of the general regulatory and statutory regimes by submitting that, having obtained Ngai Tahu permission and taken the shellfish in the traditional Māori way for personal consumption, he was exercising a customary Māori fishing right.

In response to this claim, Williamson J summarised the historic judicial vacillation over "Māori rights" as having evolved from an initially "benevolent and even protective attitude" towards Māori,[176] to a more recent "restrictive approach," particularly in relation to land.[177] Significantly, *Te Weehi* was distinguishable from these narrow Native title precedents because it concerned non-territorial use-rights, severable from ownership of the foreshore or tidal zone.[178] Moreover, "Māori fishing rights" were specifically preserved in s 88(2) of the Fisheries Act 1983.[179] Williamson J interpreted this section as encompassing *customary* Aboriginal rights, both cognisable and enforceable by the courts as an integral part of the common law unless "expressly extinguished by statute."[180] The legal relevance of Māori customary rights is therefore not contingent on specific statutory preservation, and when ascertaining liability under the Fisheries Act, McHugh notes that "local courts are required to investigate and enforce Māori customary law."[181]

Ultimately, the evidence of historic practice established "a limited customary right" to take reasonable quantities of shellfish for personal consumption – a right "clearly" inapplicable to Europeans or other New Zealanders.[182] In response to the Crown's

[175] Fisheries (Amateur Fishing) Regulations 1983, reg 8(1)(b); and Fisheries Act 1983, s 94(1)(c), respectively.
[176] *Te Weehi,* above n 58, at 687. This benevolence was evinced in *Kauwaeranga* (1984) 14 VUWLR 227 (Native Land Court, 3 December 1870, Fenton CJ); and *R v Symonds*, above n 116.
[177] *Te Weehi,* above n 58, at 686-688. Per Williamson J, examples of this parochial stance include *Wi Parata*, above n 1*; Nireaha Tamaki v Baker,* above n 155; *Mangakahia v New Zealand Timber Co Ltd* [1881] NZLR 2 SC 345; *Tamihana Korokai v Solicitor-General* [1912] 32 NZLR 312 and *Waipapakura v Hempton,* above n 58.
[178] *Te Weehi,* above n 58, at 691 overturned the earlier ruling on the non-severability of fishing rights and land ownership rights in *Waipapakura v Hempton*, above n 58.
[179] *Te Weehi,* above n 58, at 688.
[180] At 692.
[181] McHugh *Māori Magna Carta,* above n 38, at 131.
[182] *Te Weehi,* above n 58, at 693.

arguments of legal inequality and discrimination, Williamson J observed that "such inequality between persons may indicate an overall justice rather than an injustice."[183] What are the implications of such a tantalising statement? How far can this legitimately be extrapolated? The High Court's self-professedly "more general" view appears to endorse the re-recognition of Māori customary law-ways (at least where these relate to rights "apart from ownership in land") in order to redress historic injustices and grievances dating from the colonial epoch.[184]

Te Weehi epitomised a veritable "burst of Treaty-related jurisprudence" which "promised a set of common law principles that synthesised Treaty and 'aboriginal rights' elements and to which courts might have unapologetic recourse."[185] *Te Weehi* achieved the recognition *de jure* of tikanga Māori in the context of this customary fishing right, and a raft of cases applied Māori customary law in its aftermath.[186] By reversing the principle of non-justiciability established in *Wi Parata*, this precedent realigned New Zealand with the North American jurisprudence of Indigenous rights,[187] and signalled a brave new world for Treaty-based public law claims.

However, the courts beat a hasty retreat in the 1995 whale-watching case,[188] and McHugh depicts the ensuing case law as cautious and ambivalent about broadening "the boundaries of recognition."[189] Many cases misunderstood the implications of *Te Weehi*, perceiving it to be premised upon a recognition of Treaty fishing rights, whereas the judgment clearly relies on the common law doctrine of Native title.[190] Throughout the 1990s, the courts experienced considerable difficulty in grappling with "a number of complex issues" whenever tikanga Māori intersected with the rules of the State's legal system.[191] And then along came *Ngāti Apa* – a case which nudged

[183] At 693.
[184] At 693.
[185] McHugh *Aboriginal Societies*, above n 40, at 422.
[186] See, for example, *Minister of Agriculture and Fisheries v Campbell* [1989] DCR 254 (DC); *Minister of Agriculture and Fisheries v Love* [1988] DCR 370 (DC); *Minister of Agriculture and Fisheries v Hakaria* [1989] DCR 289 (DC); *Reihana v Minister of Agriculture and Fisheries* HC Invercargill AP 4/89, 13 August 1989; *Rarere v Minister of Agriculture and Fisheries* HC Gisborne AP 12/90, 11 February 1991.
[187] This jurisprudence is best exemplified by the decisions of the Supreme Court of Canada in *Calder,* above n 47; *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *R v Sparrow* [1990] 1 SCR 1075.
[188] *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA).
[189] McHugh *Aboriginal Societies*, above n 40, at 422.
[190] McHugh *Māori Magna Carta,* above n 38, at 131.
[191] D.V. Williams "Māori Issues II" [1990] NZRL Rev 129 at 131.

New Zealand's common law beyond Anglo-centric concepts of property, and, by extension, beyond Anglo-centric concepts of law.

B Ngāti Apa: *Extending the Boundaries of the Common Law*

In this case, several Marlborough Sounds iwi had applied to the Māori Land Court for declaratory orders of their customary rights to the foreshore and seabed, such declarations constituting the Court's jurisdiction under s 131(1) of the Te Ture Whenua Māori Act 1993. The claimants then sought an investigation of title and a vesting order under s 132, which would change the status of such land from Māori customary land (held according to tikanga Māori) to Māori freehold land. The Attorney-General and joint non-Māori parties contested this customary claim, both on common law and statutory grounds. First, the Attorney-General relied upon *In Re the Ninety Mile Beach* for the proposition that customary title had been extinguished in all foreshore between the high and low water marks in which contiguous landward title had been investigated by the Māori Land Court.[192] Secondly, it was argued that certain legislation, by vesting all such property in the Crown, had extinguished any Māori customary property in the foreshore and seabed.[193] These arguments were fatally premised on the *Wi Parata* assumption that the extinguishment of Native title was coterminous with British acquisition of sovereignty.[194]

In the Māori Land Court, Judge Hingston permitted the claim to progress to an evidential hearing on Māori customary rights, distinguishing the *Ninety Mile Beach* case on the facts and denying that the vesting legislation had extinguished any customary property.[195] In the High Court, however, Ellis J applied the *Ninety Mile Beach* case to conclude that Māori customary property in the foreshore *had* been extinguished.[196] After an arduous passage through the Māori Appellate Court and the High Court, the Court of Appeal was ultimately tasked with ascertaining the extent of the Maori Land Court's jurisdiction to determine the status of foreshore or seabed.[197]

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[192] *Ngāti Apa*, above n 46, at [4], citing *Re the Ninety-Mile Beach*, above n 164.
[193] At [4], citing s 7 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 and s 9A of the Foreshore and Seabed Endowment Revesting Act 1991.
[194] At [61] and [79].
[195] *In Re Marlborough Sounds Foreshore* (1997) 22A Nelson MB 1.
[196] *Attorney-General v Ngāti Apa* [2002] 2 NZLR 661.
[197] *Ngāti Apa*, above n 46, at [6].

The Court of Appeal unanimously overruled the *Ninety Mile Beach* case, concluding that Māori customary property interests had not been extinguished by (i) the Crown's assumption of sovereignty; (ii) the Māori Land Court's investigation of title to adjoining land; (iii) purported statutory extinguishment; or (iv) statutory regulation of activities in the intertidal zones. Consequently, the Māori Land Court *did* have jurisdiction to investigate Māori title to the foreshore and seabed.[198]

In doing so, the Court rectified two fundamental misconceptions which had plagued the High Court judgment and its forebears. Elias CJ explicitly labelled *Wi Parata* as "discredited authority" and denounced the *Ninety Mile Beach* case as "contrary to other and higher authority" and "revolutionary," even by contemporary standards.[199] The other Justices concurred, deeming these precedents to have been "wrongly decided."[200] Per Elias CJ, the High Court had erred:[201]

> … in starting with the English common law, unmodified by New Zealand conditions (including Māori customary proprietary interests), and in assuming that the Crown acquired property in the land of New Zealand when it acquired sovereignty.

First, New Zealand common law was not synonymous with its English equivalent. Far from being monocultural, the Antipodean legal system was uniquely sourced from two streams: both an Anglo-centric import, and extant Indigenous law-ways. Secondly, following the erroneous obiter in *Wi Parata*, the Court had wrongly conflated sovereignty and its accompanying radical title (*imperium*) with private property ownership (*dominium*).[202] In reality, however, the Crown's paramount interest in land was burdened by common law Native title rights, capable of extinguishment "only by consent or with statutory authority."[203] These two issues are rather intricately intertwined.

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[198] At [91] per Elias CJ. Significantly, the Court of Appeal was then New Zealand's highest domestic appellate body.
[199] At [13] per Elias CJ.
[200] At [158] per Keith and Anderson JJ; and at [204] per Tipping J.
[201] At [13] per Elias CJ.
[202] At [26] per Elias CJ. For the ostensibly "universal" knowledge of the *imperium/dominium* dichotomy, see Morris Cohen "Property and Sovereignty" (1927) 13 CLQ 8 at 8.
[203] At [85].

Tipping J noted that the advent of English common law in New Zealand "did not extinguish Māori customary title. Rather, such title was integrated into what then became the common law of New Zealand."[204] Tipping J also emphasised that the legal concept of 'title' should not be artificially constrained by equation with unadulterated English concepts, for Māori customary title was contingent on "the customs and usages (tikanga Māori) which gave rise to it."[205] Such a conclusion is bolstered by the Court's approval of Viscount Haldane's admonition against the tendency, "operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law."[206] Elias CJ endorsed His Lordship's caution against the use of abstract, Anglo-centric legal principles when dealing with questions of Native title.[207] Keith and Anderson JJ agreed, ruling that the determination of native land rights necessarily entails "the study of the history of the particular country and its usages."[208] Māori customs of land tenure, or tikanga, therefore remain an intrinsic part of our common law. In exercising its s 132 jurisdiction, the Māori Land Court was entitled to draw upon this enduring legal system to determine the existence (or lack thereof) of Māori customary title over the seabed and foreshore.[209]

Effectively "tearing out the long chapter on *Wi Parata*... and its progeny, and relegating it to an appendix of colonial injustices,"[210] the judicial errata of *Ngāti Apa* re-forged New Zealand's legal history. Re-acknowledging both the actuality and the legal validity of Māori customary law, the reasoning of the Court of Appeal has been described as perhaps "the best yet to be made by a judiciary, at least in the Commonwealth."[211] And yet, given the gravity of its subject-matter, *Ngāti Apa*

[204] At [183] per Tipping J.
[205] At [184] per Tipping J.
[206] *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (HL) at 402.
[207] *Ngāti Apa*, above n 46, at [5], per Elias CJ (citing *Amodu Tijani* at 404).
[208] At [145] per Keith and Anderson JJ. However, see [106] for Gault P's "real reservations" as to the appellants' ability to establish their claims, given that property interests "in the nature of usufructuary rights or reflecting mana, though they may be capable of recognition… in a developed common law informed by tikanga Māori, are not interests with which the provisions of Part VI [of the Te Ture Whenua Māori Act 1993] are concerned." This culturally-blinkered view of title seems diametrically opposed to the caveat voiced by Viscount Haldane, and sits uneasily alongside its benediction by the rest of the Court of Appeal.
[209] At [186] per Tipping J.
[210] Seuffert *Jurisprudence of National Identity*, above n 51, at 133.
[211] Jacinta Ruru "The Still Permeating Influence of the Doctrine of Discovery in Aotearoa/New Zealand: 1970s-2000s" in Robert J Miller and others (ed) *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, New York, 2010) 227 at 234.

provoked a maelstrom of public controversy, political opportunism and misunderstanding.[212] It was therefore somewhat unsurprising that, in the next public legal clash of cultural values, "matters of life and death, so central to human identity"[213] would arouse a similar media frenzy.

[212] Seuffert *Jurisprudence of National Identity*, above n 51, at 133. For an account of the political and legislative consequences of *Ngāti Apa*, see Claire Charters and Andrew Erueti (ed) *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University Press, Wellington, 2007); Tom Bennion, Malcolm Birdling and Rebecca Paton (ed) *Making Sense of the Foreshore and Seabed: A Special Edition of the Māori Law Review* (Māori Law Review, Wellington, 2004).
[213] *Takamore*, above n 6, at [99] per Elias CJ.

Chapter III: Takamore v Clarke - *A New Take on Tikanga?*

Perhaps better known under its colloquial epithet, "the body-snatching case,"[214] *Takamore* concerned an inter-family dispute over the manner and burial location of James Takamore. Progressing to the Supreme Court, this case has been portrayed as "a clash of cultures and customs… a Māori challenge against the common law rule" positing the executor as primary decision-maker.[215] The High Court and a majority of both the Court of Appeal and the Supreme Court affirmed the longstanding common law rule that the final decision was that of the executor, but each Court reached that decision for different reasons and enunciated different processes for decision-making. Significantly, each echelon of the judicial hierarchy also commented on the legal standing of tikanga Māori – comments which simultaneously recognise and respect Māori customary law, while subordinating it to the propriety of the common law.

A Background

James Takamore, of Whakatohea and Tūhoe descent, was born in Taneatua, near Whakatane in the Bay of Plenty.[216] His whanau marae, Kutarere, is governed by Tūhoe tikanga. Mr Takamore met Denise Clarke in the early 1980s, and followed her to Christchurch after the birth of their first child in 1985. Although Takamore regularly phoned his mother, he returned to the Bay of Plenty only twice after relocating to Christchurch, and made comments publicly dissociating himself from his Taneatua whanau.[217]

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[214] "Body-snatching burial case ends with victory for widow" (18 December 2012) Radio New Zealand News <http://www.radionz.co.nz/news/te-manu-korihi/123770/body-snatching-burial-case-ends-with-victory-for-widow>; Shane Cowlishaw and Olivia Wannan "Takamore body-snatching case could lead to standoff" (19 December 2012) Stuff.co.nz <http://www.stuff.co.nz/national/8096895/Takamore-body-snatching-case-could-lead-to-standoff>.

[215] Nicola Peart "Immediately Post-Death: The Body, Body Parts and Stored Human Tissue" (paper presented to New Zealand Law Society Family Law and Property Law – "Death and the Law" Intensive Conference, May 2012) 115 at 117. Further, Radio New Zealand, above n 214, described the case as a protracted "legal battle which pitted traditional Māori protocol against the common law."

[216] Given the legal intricacies of this case (and the possibility for ethnic antagonism), a clear grasp of the factual matrix is crucial for a thorough analysis of the various judgments. Nin Tomas' comments to the media exemplify the rancour generated by this case, condemning the judicial "dismemberment" and "outlawing" of tikanga in *Takamore* (in both the High Court and Court of Appeal) as "cultural genocide": Yvonne Tahana "'Cultural genocide' claim in body-snatch case" *The New Zealand Herald* (online ed, Wellington, 16 July 2012).

[217] Mr Takamore told friends that he regarded Christchurch as his home, that he "was now a South Island Māori" and "didn't like the stuff that happened" in his family in the North Island: *Takamore v*

On 17 August 2007, Takamore died suddenly of an anuerism in Christchurch, where he had lived for almost three decades with Ms Clarke and their children. His will appointed Ms Clarke as sole executrix and instructed that his body be buried, without specifying a burial location. Ms Clarke promptly commenced funeral arrangements in Christchurch. However, Takamore's mother, brother, sister and her partner arrived on 18 August to make a claim for his body,[218] demanding to bury Takamore at the Kutarere urupa[219] in accordance with Tūhoe tikanga. When familial negotiations reached an impasse, the Taneatua whanau unilaterally took possession of Takamore's body. Ms Clarke obtained an urgent interim injunction restraining burial (which was not served), and finally a disinterment license, which had not been actioned at the time of trial.[220]

Both parties accepted that no legislative prescription existed, and that their claims would therefore be decided according to the common law of New Zealand.[221] Ms Clarke sought orders authorising her to disinter Takamore's body, which the Taneatua whanau opposed on the basis that "the common law gives effect to Tūhoe custom or tikanga" which had been in existence from time immemorial and practised continuously amongst the whanau, their hapu and iwi as an integral part of their lives and identity.[222] Essentially, the Court faced two broad issues: (i) whether the common law or Tūhoe tikanga applied to the disposal of the body; and (ii) whether tikanga overrode the deceased's wishes if customary traditions had ceased to play a meaningful part in the deceased's life.

B High Court

From complicated precedent, Fogarty J distilled the principle that an executor has the common law right to determine the manner of disposal of the deceased's body,

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Clarke [2012] 1 NZLR 573 (CA); [2011] NZCA 587 at [21]-[31]. Mr Takamore also appeared to have adopted an English pronunciation of his surname: Peart, above n 215, at 117.

[218] These individuals will henceforth be referred to collectively as "the Taneatua whanau."

[219] Burial ground.

[220] *Takamore v Clarke,* above n 217, at [31]-[44].

[221] *Takamore,* above n 6, at [4].

[222] *Takamore v Clarke,* above n 217, at [3].

subject to fiduciary duties.[223] In her capacity as executor, Ms Clarke had a corresponding duty to consult with and consider the views of the Taneatua whanau. Having satisfied this duty, Ms Clarke had the right to make the final decision regarding burial arrangements and claim possession of the body until it was "properly" buried.[224] This power was unaltered by temporary or 'improper' burial, thus a continuing course of action remained available to Ms Clarke, subject only to the issue of "whether and how Tūhoe tikanga collides with the common law."[225]

The "ultimate question" was whether the application of tikanga was "reasonable" in the circumstances.[226] Fogarty J concluded that Tūhoe tikanga was unreasonable here because it prioritised the "collective will" of the tribe over Takamore's "individual freedom." A cardinal principle of the common law, "individual freedom" could not be limited or overridden by collective decision-making unless that freedom had been relinquished during the deceased's lifetime by adherence to tribal customs, obligations and conditions.[227] As Tūhoe tikanga had not evolved so as to allow Takamore or his Christchurch family the freedom to opt out of Tūhoe burial custom,[228] it could not be reasonably imposed on his executor or his body. The defendants therefore lacked lawful authority to dispossess Ms Clarke of the body.[229] Josephine Takamore appealed the decision.

Given his conclusion of "unreasonableness," Fogarty J did not have to "formally decide" either the content of the relevant tikanga, nor whether it constituted part of the common law. However, His Honour indicated that there was "clearly a powerful argument in support of both propositions" – an enigmatic addendum which hinted at greater potential status for Māori customary law within the common law generally.[230]

C Court of Appeal

[223] *Clarke v Takamore* [2010] 2 NZLR 525 (HC) at [46].
[224] At [47].
[225] At [52]-[53].
[226] At [82]. This prerequisite of "reasonableness" was extracted from Cooper J's judgment in *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).
[227] *Clarke v Takamore,* above n 223, at [87]-[88].
[228] At [73].
[229] At [90].
[230] At [89].

While the Court of Appeal unanimously dismissed Ms Takamore's appeal, it divided as to the reasons, and the majority opinion of Glazebrook and Wild JJ differed significantly from the rationale expounded in the High Court as to why the common law should trump tikanga in these circumstances.

In his minority judgment, Chambers J endorsed Fogarty J's ruling that Takamore was free to change his cultural identity, thereby precluding the posthumous application of Tūhoe tikanga to his body. Given the "overwhelming" evidence that Takamore had chosen to live outside Tūhoe tribal life,[231] "Tūhoe customary law, even if valid, did not apply to him and does not apply to his body," therefore "the pure common law should apply."[232] Conversely, Glazebrook and Wild JJ rejected the "quite unsafe" conclusion that Takamore had abandoned his Tūhoe heritage.[233] Indeed, given the urbanisation of modern New Zealand society, their Honours warned against jumping to precipitous conclusions that an individual had lost (or severed) their connection with Māori culture "simply because they live outside traditional tribal lands and do not practice the traditional customs and ways of their Indigenous group."[234]

Having found that Takamore had not renounced his tribal connections, the majority then noted the common law presumption of continuity, accepting that Indigenous customs continued to govern intra-Māori affairs (including burial) and comprised part of the common law until abrogated by statute.[235] In order to benefit from this presumption, the particular Tūhoe tikanga would have had to satisfy five well-established principles of recognition "analogous to those used to recognise customs in England, although with some modifications."[236] These criteria involved (i) longevity;

[231] *Takamore v Clarke*, above n 217, at [289] per Chambers J.
[232] At [322].
[233] At [156]. The majority also denied that Takamore had expressed a "single clear view" as to his preferred burial location: at [162].
[234] At [158].
[235] At [112].
[236] At [121].

(ii) continuity;[237] (iii) reasonableness;[238] (iv) certainty;[239] and (v) lack of statutory extinguishment.[240]

While the first two criteria were satisfied here, the custom was deemed unreasonable because it contravened a general principle "at the root" of New Zealand's legal system.[241] The majority rejected Fogarty J's "individual autonomy" conclusion on the reasonableness requirement, as such an approach would almost invariably negate Māori custom, which was inherently collective and whakapapa-centric.[242] Glazebrook and Wild JJ still held that the Tūhoe burial custom was unreasonable, albeit on different grounds.[243] If agreement was not forthcoming in a burial dispute, tikanga permitted one "simply to take the body."[244] This potential for the strongest party to unilaterally seize the body would legitimise the use of force, and was "contrary to the principle of 'right not might'", which is a "fundamental principle of the rule of law."[245]

While unreasonableness was sufficient grounds to dispose of the appeal, the Court also found that the Tūhoe tikanga failed the certainty requirement. As contended for, the custom provided no "clear allocation of legal rights to the body" but rather, "a process for debate and negotiation." And in situations of dispute, the custom neglected to provide "a mechanism for making a final decision."[246] Neither reasonable nor certain, Tūhoe tikanga was not cognisable as part of the common law of New Zealand.

[237] At [122]-[123].
[238] At [124]-[127].
[239] See [128]-[132] for the concession that "this requirement could not apply with the same rigour as it does to English customs because Māori customary law has its basis in broad values and varies between hapu and iwi."
[240] At [133]-[134]. Customary rights may only be extinguished by unambiguous statutory provisions: *Ngāti Apa,* above n 46, at [85].
[241] *Johnson v Clark* [1908] 1 Ch 303 at 311.
[242] *Takamore v Clarke*, above n 217, at [151].
[243] See [92]-[94] for a summary of the Court of Appeal's findings on the expert evidence on the custom's content.
[244] At [163].
[245] At [165]–[166]. Although there was less risk of such actions instigating war in modern society, the majority predicted that the taking of a body could easily escalate into violence.
[246] At [167]. Other than the aforementioned seizure of the body and subsequent redress of the aggrieved party's loss.

Two further tensions compounded the difficulty with recognising tikanga in this case. First, in a case involving a clash of cultures, how would the custom apply to non-Tūhoe, such as Ms Clarke? This was tentatively labelled as a "conflict of laws issue."[247] Secondly, assuming that the deceased's cultural status determined the personal application of tikanga, should a person's ethnic identity be determined by common law or Indigenous standards?[248] Glazebrook and Wild JJ were of the view that the custom should nevertheless be taken into account. Their Honours therefore proceeded to outline a "more modern approach" to Māori customary law that would integrate it into the common law wherever possible, rather than rely on strict colonial desiderata of recognition.[249]

1 Self-professed modernity

The Court's "workable compromise" between the common law and Tūhoe tikanga relating to burial envisaged Tūhoe custom as "a relevant cultural consideration for an executor or executrix to take into account in determining the method and place of burial."[250] Thus, where the deceased and one or more family members are Tūhoe, the executor should adopt "a culturally appropriate process" in which decisions about the burial are openly discussed and negotiated. All whanau members, including non-Tūhoe, should be given the opportunity to participate, and provided with full information to enable them to do so. The majority held that such faciliation did not occur here. Ms Clarke was unfamiliar with Tūhoe customs and decision-making processes. These should have been explained to her, enabling her to consider them in fulfilment of her duties as executor.[251]

If consensus is reached, it would be unreasonable for the executor to refuse to give effect to this.[252] Where consensus cannot be reached, however, the common law rule should prevail, leaving the final decision to the executor.[253] While Tūhoe tikanga was undoubtedly an important cultural consideration, it could not ultimately dictate the

[247] At [196].
[248] At [191]. Given the ruling of unreasonableness, and the obiter comments on uncertainty, there was no pressing need to adjudicate on these issues.
[249] At [254].
[250] At [255].
[251] At [261].
[252] At [255].
[253] At [258].

outcome because the "the common law requires an executor to make the final decision as to the method and place of burial" whereas "Tūhoe custom permits the taking of the body without agreement".[254] The 'unreasonableness' of Tūhoe tikanga precluded any deeper legal fusion in this instance.

Such an integrated approach would, their Honours hoped, allow the common law to develop consistently with the Treaty of Waitangi. It would also harmonise New Zealand policy with the directives of the United Nations Declaration on the Rights of Indigenous Peoples (as well as other international human rights covenants), by acknowledging "the collective nature of Indigenous culture and the value of their diversity."[255]

2 Problems with the "modern" compromise

Despite the high-sounding promise and potential of both strategies, Laura Lincoln has persuasively argued that neither the prima facie rules of recognition nor the alternative modern approach are "as accommodating to Māori custom as they initially appear to be."[256] Glazebrook and Wild JJ's requirements of recognition are not only premised on a dubious legal parallel, but difficult to satisfy when applied to tikanga Māori.

The analogy with English common law recognition of local custom was arguably inappropriate in New Zealand circumstances. No New Zealand court had hitherto drawn such a nexus.[257] The closest antipodean analogy seems to be an implied one in *Public Trustee v Loasby*,[258] yet the test for recognition adopted therein is "distinct, and arguably more appropriate" than that established by the *Takamore* majority.[259] In *Arani v Public Trustee of New Zealand*,[260] the Privy Council recognised the incommensurability of Māori custom and English local custom. Lord Phillimore

[254] At [257].
[255] At [254]; *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007).
[256] Laura Lincoln "Sir Edward Taihakurei Durie student essay competition 2012 – *Takamore v Clarke* [2011] NZCA 587: the most significant legal development affecting Māori" (February 2013) Māori Law Review <http://maorilawreview.co.nz/2013/02/sir-edward-taihakurei-durie-student-essay-competition-2012-takamore-v-clarke-2011-nzca-587-the-most-significant-legal-development-affecting-maori/>.
[257] Lincoln, above n 256.
[258] *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).
[259] Lincoln, above n 256.
[260] *Arani v Public Trustee* [1920] AC 198 (PC).

acknowledged that while Māori may retain an internal power of self-government allowing their customs to be modified, English custom lacks such quasi-legislative internal authority. Unlike its 'immemorial' English counterpart, Māori custom is inherently dynamic and amenable to modification.[261]

Glazebrook and Wild JJ cited *Arani* regarding the dynamism and malleability of tikanga, but held that these features contravened the requirements of longevity and certainty, thereby precluding its common law recognition. Although the longevity requirement has been moderated for Indigenous customs, which instead require proof of a "long-standing, consistent practice" for recognition,[262] this slightly diluted test is still unsuitable. Because tikanga Māori can evolve and adapt to new circumstances, "Māori custom in its true form could never meet the modified test."[263] The criterion of certainty was equally problematic, as the majority required "ultimate certainty" for common law recognition.[264] Such a stringent requirement would require judicial modification of uncertain customs, which would mean a common law failure "to recognise authentically Māori custom."[265] The Court neglected to address or mitigate these concerns. By setting well-nigh insurmountable thresholds for recognition, the joint judgment ensured an unfortunate outcome: the unlikelihood of future common law recognition of Māori custom.[266]

Furthermore, as Chambers J observed, the majority ruling on unreasonableness applies indiscriminately and "unnecessarily."[267] Where all parties are Tūhoe and unanimously wish to adhere to tribal customs and processes, their reliance on tikanga to decide even the minutiae of burial would be unlawful. Moreover, the majority relied on an insufficient evidential basis to reach this conclusion. In their discussion of the recognition criteria, their Honours accepted that Māori custom was not fixed from time immemorial and could have adapted after colonisation,[268] and yet (somewhat counterintuitively) "relied on evidence of *ancient practice* to hold that the

[261] At 204-205.
[262] *Takamore v Clarke*, above n 217, at [122].
[263] Lincoln, above n 256.
[264] *Takamore v Clarke*, above n 217, at [167].
[265] Lincoln, above n 256.
[266] Lincoln, above n 256.
[267] *Takamore v Clarke*, above n 217, at [321] per Chambers J.
[268] At [122].

custom was unreasonable."[269] The majority concern with potential contemporary violence was pure speculation, and their resultant conclusion of unreasonableness was flawed.

Even the alternative "more modern" approach has no significant effect on the treatment of Māori custom because it simply reiterates the existing common law duties of executors.[270] Indeed, the majority conceded that their modern approach required "little extension of the common law relating to burial," as the expected process of consultation "with a range of stakeholders" was one of several principles of Tūhoe tikanga already accommodated in the common law.[271]

Given the divergence of judicial opinion on both the duties of executors and the role of Māori custom, it was relatively unsurprising that the Supreme Court granted leave to appeal.[272]

D Supreme Court

Nor, however, was consensus to be found at the summit of New Zealand's appellate system. The Supreme Court split 3:2. The majority judgment of Tipping, McGrath and Blanchard JJ placed primacy on the common law rights held by the executor, and positioned Māori burial customs as a relevant consideration for the legal decision-maker. In separate dissenting judgments, Elias CJ and William Young J rejected this "first-decider status" postulated by the majority.[273] However, they concurred that the common law imports tikanga as a value and matter to be weighed in the decision-making process.

Tipping, McGrath and Blanchard JJ affirmed that English common law had only ever applied in New Zealand insofar as applicable to the circumstances of the colony, and thus the common law of New Zealand "reflects the special needs of this country and

[269] Peart, above n 215, at 123 (emphasis added).
[270] Lincoln, above n 256.
[271] *Takamore v Clarke*, above n 217, at [257].
[272] Peart, above n 215, at 125 described this appeal as "a rare opportunity to address… the extent to which the common law should accommodate Māori custom in the private law sphere."
[273] *Takamore*, above n 6, at [173] per William Young J.

its society." Barring unequivocal statutory extinguishment, "our common law has always been seen as amenable to development to take account of custom."[274]

Their Honours dismissed the appeal, being satisfied of the existence of a "common law rule under which personal representatives have both the right and duty of disposal of the body of a deceased."[275] This "well-established" rule required the executor to consider "different cultural, religious and spiritual practices as well as the views of immediate and wider family." Such responsibility ensured that "due weight is given by the common law to the tikanga concerning Māori burial practices, where they arise and are brought to the attention of decision-makers."[276] The majority perceived this pragmatic rule as "highly desirable" during occasions of great grief and loss; "both practical and convenient," it obviated the need for litigation by forcing parties to accept the personal representative's decision.[277] This approach allegedly "allows a range of values to be weighed without presuming, in advance, which cultural position will prevail" while simultaneously ensuring expedient decision-making for reasons of public health and decency.[278]

When the deceased is of Māori descent, whanau invocation of tikanga will not trump the common law relating to burial. Instead, the common law of New Zealand requires the personal representative, as ultimate arbiter of burial disputes, to consider tikanga alongside all other important values which form the deceased's heritage.[279] In burial disputes, the Supreme Court has clarified that tikanga Māori is not *primus inter pares*, but one consideration among many.

Ultimately, the majority found that "Takamore's life choices" to reside in Christchurch with Ms Clarke carried "greatest weight" and were determinative. The Court therefore upheld Ms Clarke's decision as appropriate, and ordered that disinterment should be effected so as to respect "the sensitivities of his [Takamore's] Kutarere family and relevant Tūhoe custom."[280]

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[274] At [150].
[275] At [152].
[276] At [152].
[277] At [153].
[278] At [157].
[279] At [164].
[280] At [169].

1 Dissension: Burial as "a shared responsibility"[281]

Given "wider considerations of cultural diversity and in particular Māori tikanga,"[282] and the long-standing "no property rule" relating to corpses, Elias CJ denied the executor's exclusive right to determine burial matters.[283] Her Honour perused the "meagre statutory background" against which the common law was to resolve the issue, and found that s 25 of the Coroners Act 2006 indicated "legislative recognition of Māori cultural practices which also properly influence the judge-made common law."[284] Evidently, statutory acknowledgement and facilitation of Māori practices exerts a corresponding effect on the common law recognition of such practices.

According to the Chief Justice, the common law did not justify a rule elevating the executor to primary decision-maker.[285] One of her core reasons for this stance was that our "few and sparsely reasoned" authorities neglected to mention "cultural values in New Zealand society… and in particular do not deal with Māori values and cultural preferences" which properly influence the treatment of the dead.[286] While it would be overly simplistic to credit tikanga as the *sole* factor here, Elias CJ partially dismissed these precedents for their insufficient engagement with Māori custom.

Rather than awarding either claimant the right in law to determine burial affairs, or conceptualising the two value-systems as binary opposites, Elias CJ denounced the "false antithesis" held to exist between "pure common law" and tikanga Māori.[287] Her Honour asserted that:[288]

> Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent

[281] At [90] per Elias CJ.
[282] At [81].
[283] At [90] per Elias CJ.
[284] At [47]. Section 25 permits family members to remain with the body while it is under the control of the coroner. While "family members" are not defined in the Act, Elias CJ presumes that this must be a broader concept than that of "immediate family," defined in s 9 as dependent on "cultural links as well as personal and blood relationships." Section 9 expressly includes whanau within the ambit of "immediate family." Elias CJ notes that the Law Commission's report, which instigated this provision, was prompted "by the need to respect and facilitate Māori practices and preferences and the involvement of the wider whanau grouping with respect to the treatment of those who have died."
[285] At [55]-[58], [62] and [77] per Elias CJ.
[286] At [62].
[287] At [92].
[288] At [94].

> jurisdiction, according to their materiality in the particular case… Māori custom according to tikanga is therefore part of the values of the New Zealand common law.

In this case, "the understandable wish" of the Christchurch family clashed with "the understandable obligation" of the Taneatua whanau to have Takamore interred in close proximity to his whakapapa and birthplace. Both value-laden preferences "derived from different and equally valid cultural frameworks."[289] Even if there had been irrefutable evidence that Takamore had repudiated his tribal heritage, hapu values would remain relevant. The Taneatua whanau would still have had standing to invoke tikanga in a claim for the body. While the deceased's views are a mandatory consideration, they are not legally determinative. This is true "even in a case without a cultural dimension." Because such decisions impact "the enjoyment of the culture of the hapu in a way which engages s 20 of the New Zealand Bill of Rights Act (NZBORA)" as well as the Treaty of Waitangi and its preservation of Māori society, the interest of this minority group *must* be weighed, regardless of the wishes of the deceased.[290] "Might not right" was thus an unnecessarily pejorative way of framing Māori customs, one which illegitimately denied the consideration of Tūhoe tikanga in favour of "individual freedom," a principle which the common law does not, in fact, accept as conclusive in burial disputes.

Regardless of common misconceptions about the paramountcy of spousal preference in disputed burial matters, Elias CJ emphasised that "the wider circumstances" may dictate a different outcome. It would "be paying lip service" to the importance of Māori society and culture in New Zealand (derived from the Treaty of Waitangi and recognised in the NZBORA and modern legislation) to conclude that the wishes of the spouse will always eclipse other interests. The Chief Justice held that "[w]here traditional identity and important cultural values are at stake, preference for the spousal connection may properly yield."[291] Here, the "powerful" cultural claims of the

[289] At [98] per Elias CJ.
[290] At [100] per Elias CJ. Section 20 of the New Zealand Bill of Rights Act 1990 affirms the rights of, *inter alia,* ethnic minorities, who: "shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority."
[291] At [101] per Elias CJ.

Taneatua whanau were overridden by Takamore's life choices.[292] Interestingly, Elias CJ concluded with the significant obiter statement that, had Takamore maintained his family connections with Kutarere "even slightly, the claim based on whakapapa, identity, and hapu may well have prevailed."[293] This hypothetical scenario seems to set an undemanding threshold for tikanga Māori to outweigh any competing cultural precepts.

William Young J agreed with Elias CJ that the deceased's executor ought not to have "a first decider role" in relation to burial.[294] However, he found the Chief Justice's concession to customary law "substantial" but insufficient. His Honour disapproved of her positioning the High Court as ultimate decision-maker, instead of allowing an organic Māori process "which can, in the end, only be resolved by consensus, acquiescence or submission." William Young J appears to adopt a much more radical stance than the rest of the Court, pointedly criticising the "lesser extent" of the majority's accommodation of tikanga, and noting that "[the] final – and I think decisive – consideration is Māori… custom."[295] His Honour implied that greater common law genuflection to tikanga would be the ideal solution to any future cultural collisions.

E Residual uncertainties

As the first case to explicitly focus on the common law recognition of Māori customary law, *Takamore* is an undeniably important precedent. However, even beyond their 3:2 split over the common law duty of an executor, there is a certain opacity to the Supreme Court's verdict. What are the implications of the majority judgment for the legal recognition of tikanga? Is it simply part of the law pertaining to burial matters? Or part of the common law generally?

Unlike the Court of Appeal, the majority proclaimed tikanga as a relevant consideration in burial disputes without determining *when* and *how* it could be

[292] At [102] per Elias CJ.
[293] At [105] per Elias CJ.
[294] At [173].
[295] At [213].

recognised as part of the common law.[296] In contrast to the approach of the lower courts, Tipping, McGrath and Blanchard JJ did not initially apply the common law doctrine of continuity to ascertain the legal status of tikanga. Instead, their Honours simply accepted the "executor primacy rule" and found that the common law accommodated customary law by framing this rule so that tikanga is a relevant consideration in the executor's decision-making.[297] Problematically, the Supreme Court did not explain why they had sidestepped the possibility of tikanga being recognised as law by virtue of the doctrine of continuity, and its clear requirements for recognition of custom. Residual ambiguity results from the Court's failure to clarify how they considered and weighed the tikanga observed by the Taneatua whānau in this case.[298] Can tikanga ever be law in this area, or has the Supreme Court effectively relegated tikanga to only ever being a factual consideration in burial disputes? It is currently unclear "whether the Court has eliminated the possibility of tikanga coming into the matrix of consideration not just as fact but as law."[299]

Despite rejecting the existence of a rule determining who can dispose of the deceased's body, Elias CJ also held that tikanga is only a consideration to be weighed by the Court as part of the "values" of New Zealand's common law in determining a burial dispute.[300] But what does this actually mean for the legal recognition of tikanga? What does it mean to be a "value" of the common law? Does the minority judgment, too, consign tikanga to *factual* status? What other values must be weighed? In the context of burial disputes, "the status of tikanga… is therefore left in a somewhat confused state."[301]

Despite its circumvention of the doctrine of continuity, all judgments at the Supreme Court level acknowledged that the common law requires reference to tikanga. Perhaps this acceptance means that tikanga is part of the general common law, irrespective of whether it satisifes the requirements for recognition set out by the

[296] Natalie Coates "What does *Takamore* mean for tikanga?" (February 2013) Māori Law Review <http://maorilawreview.co.nz/2013/02/what-does-takamore-mean-for-tikanga-takamore-v-clarke-2012-nzsc-116/>.
[297] See *Takamore*, above n 6, at [164]. The majority also confirmed that tikanga would be considered by the Court in the event of any challenge to the executor's decision.
[298] Coates, above n 296.
[299] Coates, above n 296.
[300] *Takamore*, above n 6, at [94].
[301] Coates, above n 296.

Court of Appeal. In myriad other areas where tikanga intersects with the common law, *Takamore* may therefore indicate that tikanga is now a consideration or part of the "values" that influence outcomes. Natalie Coates, an otherwise staunch critic of the ambiguity of *Takamore,* has lauded this element of the case as "a potentially exciting recognition of the relevance and applicability of tikanga in the New Zealand legal framework."[302]

None of the judgments expressly overrule the Court of Appeal approach to the recognition of tikanga as law, hence the difficulty of drawing "concrete conclusions" on this issue. However, Coates asserts that these tests still stand, and that *Takamore* furnishes New Zealand courts with two avenues through which to recognise tikanga: either "as law under the Court of Appeal tests or, failing that, as a value or relevant consideration to be taken into account by decision-makers."[303] Thus, when the relevant tikanga does not satisfy the five desiderata for recognition, "tikanga can still come in to the mix, be considered relevant and afforded weight" in a legal forum. Only the passage of time (and subsequent litigation) will tell "how the Courts and Māori will react to *Takamore*."[304] Any predictions as to the precedent impact of this case for the judicial recognition of tikanga remain speculative at best. In theory, at least, there is great scope for increased and meaningful judicial recognition of Māori customary law. In reality, however, is the New Zealand judiciary likely to instigate such structural changes?

[302] Coates, above n 296.
[303] Coates, above n 296, reminds readers that the majority decision of the Supreme Court still allows adherence to tikanga in certain circumstances. For example, where the application of Māori burial custom is not in dispute; an executor concurs with the tikanga-based approach; or an executor disagrees with the tikanga approach but the circumstances are such that on an application resulting from a dispute, the Court finds that tikanga should be given priority in the circumstances.
[304] Coates, above n 296.

Chapter IV: What, if Anything, are Contemporary Courts Doing Differently from their Colonial Era Counterparts?

"[T]ikanga Māori has been left in a kind of limbo *vis-à-vis* state law."[305]

In *Drawing Out Law,* an elegant paean to the Indigenous legal traditions of Canada, John Borrows writes in the style of Anishinabek Nation's legal traditions and folklore to challenge the positivist glass ceiling which precludes further recognition of Indigenous law.[306] 'Scroll Two' depicts a pensive young academic who mulls over the legal history he has been lecturing, and becomes despondent about the status quo. Despite the "promising developments" heralded by the common law[307] and constitutional legislation,[308] the young man was troubled that "the same decisions that protected Aboriginal rights simultaneously hid strong currents that threatened their erosion."[309] These precedents sabotaged their own potential by allowing "justified infringements" of Aboriginal rights,[310] and the unilateral reduction of treaty rights by non-Aboriginal governments.[311] New Zealand jurisprudence, I believe, exhibits the same paradox. The courts profess amenability to tikanga Māori, but are ultimately inhibited from full recognition of another system of law-ways (or normative perspectives) by their deeply-embedded commitment to the norms of the prevailing legal order.

Takamore seems to be progressive, modern, and all things desirable for the repositioning of Māori customary law within our legal system. However, this superficial liberality masks a deeper, institutional antipathy towards tikanga Māori. Just as it is undesirable to fabricate a "false antithesis" between "pure common law"

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[305] Roughan, above n 3, at 146.
[306] John Borrows *Drawing out Law: A Spirit's Guide* (University of Toronto Press, Toronto, 2010) at 23.
[307] *Calder,* above n 47, at 200. In this case, the Supreme Court of Canada recognised the justiciability of Aboriginal title as "not solely a moral or political concern," and "elevated the notion that Aboriginal peoples had un-extinguished legal interests." Moreover, *Calder* confirmed that Aboriginal rights had a *sui generis* source, "pre-existing rights" that had their own logic "indigenous to their culture [though] capable of articulation under the common law."
[308] Constitution Act 1982, s 35(1), enacted as Schedule B to the Canada Act 1982 c 11 (UK).
[309] Borrows, above n 306, at 25.
[310] See *R v Sparrow* and *Delgamuukw v British Columbia,* above n 187.
[311] *R v Marshall* [1999] 3 SCR 533.

and customary law,[312] it is equally facile to deride the ethnocentrism and parochialism of the colonial courts, while lauding modern Indigenous law jurisprudence as enlightened and egalitarian. Since its inception, New Zealand's legal profession (including the judiciary) has been weaned on two Anglocentric tenets of law: legal positivism and parliamentary sovereignty. Inextricably intertwined, this duo constitutes a golden thread of New Zealand's legal history and constitutional ethos. And it is a belligerent thread, implacably hostile to any perceived usurpation of authority, or attempts at power-sharing. Thus, while substantive changes have been wrought within the legal system, no systemic revolution has overhauled the rules of recognition. Nor, as Dawson suggests, is such change imminent.[313] But this chapter is not a battle cry against Western legal norms, nor a dirge for suppressed Indigenous mores. Positivism and parliamentary sovereignty are not necessarily insidious, inimical concepts, but ideological limitations to the common law recognition of Māori customary law within New Zealand.

A Colonial and Post-colonial Synchronicity: From Lawfare to Rights-Recognition

The divestment of autochthonous laws was a global phenomenon, by no means unique to our latitude. Throughout the world, Indigenous peoples invariably moved from a state of political independence to one of reliance upon the law-ways of the settler polity for external validation of their being.[314] By the end of the 19th century, "Empires of Uniformity" were well-established across the colonised globe.[315] These "Empires" effected "the enclosure of aboriginal culture by laws of overweening state paternalism that sought to transform aboriginal society through de-tribalisation and reconstruction of aboriginal being."[316] Compounding the use of military force, the ideological operation of "white lawfare"[317] to consolidate settler hegemony was "a shared historical trajectory."[318]

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[312] *Takamore,* above n 6, at [92] per Elias CJ.
[313] Dawson, above n 2, at 61-62.
[314] McHugh *Aboriginal Societies*, above n 40, at 1.
[315] For a thorough explanation of this neologism, see James Tully *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge, 1995) at 58-98.
[316] McHugh *Aboriginal Societies*, above n 40, at 49.
[317] Term taken from John L Comaroff "Colonialism, Culture, and the Law: A Foreword" (2001) 26 Law and Social Inquiry 305 at 306.
[318] McHugh *Aboriginal Societies*, above n 40, at 3.

Beyond this simultaneity of colonial 'lawfare', New Zealand jurisprudence has also matched international developments in its experience of the "breakthrough era" and its attendant paradigm shift. Spanning 1973 through 1992, this era transformed Indigenous "outsiders" into "meaningful legal actors" by forging "a new national jurisprudence of rights and inclusion."[319] As a result of several "landmark judgments," the Indigenous populations of North America and Australasia "became rights-bearing inhabitants of the host common law legal systems."[320] The dénouement of the 20th century heralded "seismic and systemic" change in the common law recognition of aboriginal legal interests, generating "shockwaves" and "tremors that continue to reverberate today."[321]

Characterised by the vociferous vilification of "the old-style juridicial exclusion and marginalisation," post-breakthrough era judgments are perhaps the clearest manifestation of these shockwaves. Consequently, Prendergast CJ's insouciant dismissal of the Treaty as "a simple nullity" is repeatedly stigmatised.[322] In the domain of proprietary rights, *Ngāti Apa* saw the Court of Appeal making a concerted effort to distance the judiciary from the dark, ethnocentric and assimilative colonial past associated with *Wi Parata*.[323]In *Takamore*, the Supreme Court judgment was silent as to the status of this much-maligned case and the Court of Appeal did not explicitly denounce *Wi Parata*. Their Honours did, however, recognise and truncate its anti-customary law legacy[324] by confirming that "the continuation of customary law is inherent in the recognition of aboriginal property in cases such as *Ngāti Apa* and *Mabo*."[325] This overt opprobium is a recurring motif of post-breakthrough era decisions in New Zealand. And yet, loud as it is, we ought not to misinterpret such precedent-bashing as representing greater legal change than it actually augurs. According to David Williams, these repetitive denunciations of *Wi Parata* are a

[319] McHugh *Aboriginal Title,* above n 47, at 3.
[320] At 3. As his "landmark" examples, McHugh lists *Calder*, above n 47; *Martinez v Santa Clara Pueblo* 436 US 49 (1978); *Te Weehi*, above n 58; *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [the *Lands* case]; and *Mabo,* above n 47.
[321] McHugh *Aboriginal Title,* above n 47, at 4.
[322] Williams, above n 134, at 2. Subsequently, in *Minister of Conservation v Māori Land Court* [2008] NZCA 564 at [126]-[127], Baragwanath J emphasised that *Wi Parata* had been "excoriated by this Court in *Ngāti Apa*" and described the former case as one "now known to all law students as a case in which a court… unjustly deprived Māori of their legal rights."
[323] *Takamore,* above n 6, at [13] per Elias CJ.
[324] *Takamore v* Clarke, above n 217, at [117]. See particularly FN55.
[325] At [120].

rhetorical device, encouraging us to ignore the dominant substrata of Western legalism – and the continued assimilation of Māori into a Western legal system.

B A Complex Nullity: What We Really Mean When We Talk about Wi Parata

Deeply concerned by the general unfamiliarity with the facts of the 1877 dispute, and the well-nigh universal ignorance of the Court's explicit statement that the cession of sovereignty was "a matter with which we are not directly concerned,"[326] Williams scrutinised why this non-binding obiter dictum has been perpetually recited. He concluded, rather convincingly, that it was:[327]

> … not in order to apply it in a future case… but only in order to reject it yet again. *Distancing modern law from the colonial past,* we seem to want to reject 'a simple nullity' as often and as vehemently as possible.

What we are witnessing is essentially a protracted ideological and jurisprudential auto-da-fé. *Wi Parata* is a convenient heretic, repeatedly exhumed and re-burnt at the stake in order to purify and justify the current legal system. For a judiciary grappling with a legal history of assimilationist case law which now appears unacceptably prejudiced and discriminatory, *Wi Parata* serves as a means to an end: the attainment of some kind of collective catharsis.

Revealingly, *Wi Parata* is authority for a second (oft-ignored) statement: the non-justiciability of Crown dealings with Aborigines for cession of Native title. Premised on *jure gentium*, the Court held that these interactions are immune from judicial review because the incoming sovereign assumes "the correlative duty, as *supreme protector of aborigines*, *of securing them against any infringement of their right of occupancy*."[328] As Williams underlines, this protective principle is "invariably overlooked in contemporary jurisprudence."[329] But if it had been noticed by commentators, the fate of *Wi Parata* might have been quite different. Rather than being pilloried as a legal pariah, it may well have been "celebrated as a 'good'

[326] *Wi Parata*, above n 1, at 78.
[327] Williams, above n 134, at 4 (emphasis added).
[328] *Wi Parata*, above n 1, at 78 (emphasis added).
[329] Williams, above n 134, at 226.

case."[330] Evidently, *Wi Parata* embodied much more than rampant ethno-stratification and "the assumptions of stadial theory."[331] Irrespective of what current vitriol would have us believe, the Supreme Court of the late 19th century was not ardently anti-Māori.

Conscious of the forgotten benevolence of *Wi Parata,* Williams refutes Elias CJ's assertion that *Ngāti Apa* was "not a modern revision."[332] While he accepts *Ngāti Apa* as "a distinct and welcome advance on the old law", Williams challenges the misconception that "the old law was aberrant and that it was always 'wrong'."[333] The *Symonds/Parata* polarity itself is "a false dichotomy," as neither the colonial courts nor the Privy Council conceived of a common law doctrine of Aboriginal title in that epoch.[334] Such a doctrine did not emerge in New Zealand law until 1986/1987,[335] and it is ahistorical to project it artificially into the past as grounds for condemning Prendergast CJ. The Court applied the common law as it stood at the time, and could have done no differently.

Nevertheless, in contrast to the reverent treatment of *Symonds,* the judgment of Prendergast CJ is "so virulently condemned" because this is a remarkably *convenient* dichotomy for Treaty jurisprudence. Allegedly epitomising "judicial timidity, unrecognised racism, and over-deference to the executive," the mythopeic legal history surrounding *Wi Parata* is "baked largely, if not entirely, in a late twentieth-century oven."[336] *Wi Parata* is, ultimately, a useful scapegoat. This precedent is strategically mis-remembered in our legal history because such amnesia "enables us to lambast the awful 19th century past, and implicitly praise our current more enlightened views."[337] But this begs the question, are modern views really that much more enlightened? Without statutory incorporation, current legal orthodoxy denies the

[330] At 171.
[331] At 230.
[332] *Takamore,* above n 6, at [13] per Elias CJ.
[333] Williams, above n 134, at 208.
[334] At 229.
[335] Williams at 229-230 cites the *Lands* case (1987), above n 320; while McHugh pinpoints Williamson J's recognition of common law Aboriginal title in *Te Weehi* (1986), above n 58, as the genesis of New Zealand's "breakthrough era": McHugh *Aboriginal Title*, above n 47, at 28. Boast, however, takes issue with McHugh's chronology of the doctrine: Richard Boast "Book Review: Aboriginal Title as Contemporary Discourse" (December 2012) Māori Law Review <http://maorilawreview.co.nz/2012/12/book-review-aboriginal-title-as-contemporary-discourse/>.
[336] McHugh *Aboriginal Societies*, above n 40, at 24-25.
[337] Williams, above n 134, at 231.

Treaty legal status in domestic law.[338] Arguably, this conditional recognition means that "New Zealand law still treats the Treaty of Waitangi as little more than 'a simple nullity.'" [339] Williams finds it both ludicrous and hypocritical that modern commentators are willing "to cast stones at Prendergast and Richmond for their 1877 views" without simultaneously condemning "the almost total lack of consideration for the Treaty, especially the original Māori text… in contemporary legal discourse."[340] *Wi Parata* is an ideological façade, masking current indifference to the Treaty by honing in on distant and 'reprehensible' obiter, and elevating modern jurisprudence by implication. And yet these words ring hollow. Despite the recent reiteration of *Wi Parata*'s inherent 'wrongness,' New Zealand's legal system is still essentially monocultural, assimilative and hostile to Māori customary law.

C Assimilation: Past and Present

In the colonial era, New Zealand law was explicitly utilised as "a tool of empire."[341] Political objectives of racial amalgamation and legal assimilation long provided the impetus and justification for a purely English legal system. Today, New Zealand law is a tool of the status quo, operating covertly to perpetuate Anglocentric legal norms and suppress Indigenous competitors. McHugh depicted colonial legal systems as striving to establish "a constitutionally homogenised population, one that reflected Anglo-settler values, rather than a pluralistic one with sources of political authority apart from the state."[342] This description is equally true of modern New Zealand law, which cannot fathom any uncontrolled abdication of law-making power.[343]

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[338] *Hoani Te Heuheu Tukino,* above n 48. More recently, the Privy Council reaffirmed the necessity of statutory incorporation, despite ruling that the Treaty of Waitangi is "of the greatest constitutional importance to New Zealand": *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC).
[339] Williams, above n 134, at 233.
[340] At 233.
[341] For this apt phrase, I am indebted to Tracey Lindberg "The Doctrine of Discovery in Canada" in Robert J Miller and others (ed) *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, New York, 2010) 89 at 93.
[342] McHugh *Aboriginal Societies*, above n 40, at 49.
[343] At least not beyond the realm where Parliament has deemed the operation of tikanga Māori both appropriate and permissible. One example is the Resource Management Act 1991, refer particularly to ss 2(1) (definitions of kaitiakitanga, mana whenua and tangata whenua, among others), 6(e), and 7(a).

Richmond J (of *Wi Parata* notoriety) exemplifies the undisguised assimilationist aims of early New Zealand policy and law. A strident voice in colonial politics, His Honour entertained strong views on "Native questions" and sought to destroy "'the beastly communism' of Māori society by introducing private property in land and the rules of the common law" to the nascent colony.[344] Assimilation was invariably viewed and touted as settler beneficence – the singular route to civilisation and certainty.[345] By 1961, political correctness had advanced to the stage where the Hunn Report on the Department of Māori Affairs deferred assimilation to the indefinite future, in favour of the beneficent goal of "integration."[346] Henceforth, the Department was instructed to elevate "backward" or "primitive" Māori to a superior biculturalism (characterised by "feeling pretty much at home in either society") and ultimately to "a completely detribalized minority whose Māoritanga is only vestigial."[347]

Significantly, the Report concluded that statutory differentiation between Māori and Pakeha "should be reviewed at intervals and gradually eliminated."[348] Essentially a pseudo-choice between integration and assimilation, this official ultimatum is perhaps best characterised by McHugh as "a confused document of assimilationist propaganda."[349] In recent years, domestic case law from *Te Weehi* onwards seems to bode extraordinarily well for the legal recognition of Māori customary law.[350] However, the reality is not quite so simple. Can New Zealand law truly be categorised as post-colonial and non-assimilationist, given its peremptory commitment to legal homogeneity and hierarchy? What are the formal sources of our law? What are its cultural commitments, and what is the extent of its institutional receptiveness to legal diversity?

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[344] Williams, above n 134, at 143.
[345] S.D. Carpenter "History, Law and Land: The Languages of Native Policy in New Zealand's General Assembly, 1858-1862" (MA Thesis, Massey University, 2008) at 22-49, cited in Williams, above n, at 144.
[346] J K Hunn *Report on Department of Māori Affairs, with Statistical Supplement* (Government Printer, Wellington, 1961).
[347] Hunn, as cited in Ruru, above n 70, at 226. The limits of political correctness are rather evident in the phrasing of the report, which refers to "Group C" as "retarded" Māori.
[348] Andrew Armitage *Comparing the Policy of Aboriginal Assimilation: Australia, Canada and New Zealand* (UBC Press, Vancouver, 1995) at 145-146.
[349] McHugh *Aboriginal Societies*, above n 40, at 347.
[350] See the analysis of this judicial evolution in Chapters II and III, above.

D Why the "tenacious resistance" to Tikanga Māori?[351]

While Antipodean law has incrementally abandoned overtly assimilative policies and statutes, and although Hunn Report-style assimilation is allegedly a bygone era, the vestigial legal aversion to Māori customary law is both clear and easily accounted for. Buttressed by theories of legal positivism and parliamentary sovereignty, the formal hierarchy of the sources of New Zealand law is unyielding. The logical corollary of these two tenets is a self-perpetuating legal assimilation. Given the utter conviction in our English legal heredity, New Zealand law and its standard-bearers remain fundamentally unreceptive to the 'foreignness' of Māori customary law. It is worthwhile exploring these two deeply-entrenched concepts of law, in order to ascertain their effect on the jurisprudential stance towards tikanga Māori.

1 Legal Positivism

Elucidated most famously by H.L.A. Hart, the first of these common law canons is legal positivism.[352] "[U]ndoubtedly the dominant legal paradigm" operating in New Zealand since colonisation, positivism is best described as "a state-centred philosophy of law" which posits legislation as the superlative source of law, a codification of rules emanating from "the authoritative institutions of the state."[353] This intensive focus on the state as sole law-maker means that when the "positivist gaze" falls upon Indigenous societies, nuclei of decentralisation and common mores, "but without the trappings of a nation state… the positivist sees no law."[354]

For a prime example of the strictures of positivism, one need look no further than the rationales of the lower courts' decisions in *Takamore*. In the High Court, Fogarty J deemed Tūhoe tikanga unreasonable due to its prioritisation of tribal "collective will" over Takamore's "individual freedom."[355] Subsequently, a majority of the Court of Appeal resisted any deep recognition of tikanga, as it contravened the "cardinal principle" of "right not might."[356] Underpinning these rulings is a commitment to the

[351] Dawson, above n 2, at 60.
[352] H.L.A. Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012).
[353] Dawson, above n 2, at 60.
[354] At 60. For an historical example of the positivist perception of Indigenous 'law' and polities, see Lord Normanby's Instructions, as cited in *Wi Parata*, above n 1, at 77.
[355] *Clarke v Takamore,* above n 223, at [87]-[88].
[356] *Takamore v Clarke,* above n 217, at [165]–[166].

Hartian concept of law, one which stipulates formal, institutional processes for rule-making and rule-recognition. Devoid of any cognisable pedigree (stemming simply from shared values and religious beliefs), customs and traditions cannot constitute enforceable law on the positivist philosophy. Irrespective of the Supreme Court's ruling in 2013, the pervasive judicial attitude remains monocultural. Wary of engaging with an unwritten, unverifiable (at least by orthodox means), and finally un-*English* legal system, the judiciary still perceives tikanga as antithetical to "pure common law."[357] Their approach ultimately relegates tikanga to a second-tier consideration for decision-makers, rather than a discrete (and legitimate) collection of law-ways. Evidently, legal positivism is "deeply resistant to the recognition of any unwritten, values-based, conception of customary law."[358]

The positivist aversion to customary law is not unassailable. Numerous academics have vehemently criticised the anti-customary stance.[359] Borrows, for example, is deeply disturbed by the ethnocentric assumptions of John Austin's custom/law dichotomy.[360] Echoing the caveat of the Supreme Court of Canada,[361] Borrows issues a timely reminder that customs are often "belittled by scholars like Austin because the societies who follow them have been inappropriately labelled as inferior or even 'savage,'" and chastised for "their 'ignorance' and 'stupidity' in not submitting to hierarchical political government."[362] Positivism unacceptably perpetuates the myth of ethnic and legal inferiority. Still, this doctrine is a reality in our legal system, and its jurisprudential hegemony is only enhanced by New Zealand's rigid adherence to "the constitutional principle of parliamentary sovereignty."[363]

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[357] Despite Elias CJ's warning *against* making such a distinction: *Takamore,* above n 6, at [92].
[358] Dawson, above n 2, at 61.
[359] See Lon Fuller "The Law's Precarious Hold on Life" (1968-1969) 3 Ga L Rev 530; Lon Fuller "Human Interaction and the Law" (1969) 24 Am J Juris 1; Henry Maine *Ancient Law*: *Its Connection with the Early History of Society and its Relation to Modern Ideas* (Oxford University Press, London, 1931) at 6; E.A. Hoebel *The Law of Primitive Man* (Athenaeum, New York, 1974); Max Gluckman *Politics, Law and Ritual in Primitive Society* (Aldine Publishing, Chicago, 1965).
[360] John Borrows *Canada's Indigenous Constitution* (University of Toronto Press, Toronto, 2010) at 12-13.
[361] *Calder,* above n 47, at 346-7. In this case, the Supreme Court condemned the prejudicial rejection of Indigenous customs based on "ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or cultures, in effect subhuman species."
[362] John Austin *The Province of Jurisprudence Determined, Volume II* (2nd ed, Cambridge University Press, Cambridge, 1995) at 178 as cited in Borrows, above n 360, at 17.
[363] Dawson, above n 2, at 61.

2 Parliamentary Sovereignty

In New Zealand, the supreme legislative power vests in Parliament. Essentially, Parliament is situated at the apex of "a vertical set of constitutional relationships," unfettered by either entrenched rights or parallel legislative authorities.[364] This has been the orthodox position for over 150 years, and is unlikely to change in the foreseeable future.[365] New Zealand's legal profession subscribes wholeheartedly to "a unified, centralised system of sovereignty," and, as Dawson points out, such a legal philosophy is inherently opposed to the recognition of any external system of customary law, which is an archetypal "power-sharing arrangement, after all."[366] Indeed, to legally recognise tikanga Māori would be to accept "that there is a space within the state from which Parliament will withdraw, and not intervene"; carving out such "a system of shared sovereignty" is unfathomable to proponents of parliamentary sovereignty.[367]

New Zealand cannot accurately be classified as a decolonised legal system, as our law is imbued with legal positivism, parliamentary sovereignty, and myriad other Western norms. Whether properly characterised as an Anglocentric or Anglophilic legacy, these legal tenets continue to wreak an indelible impact on our judicial ethos. For as long as these dyadic ideas dominate New Zealand jurisprudence, the deep-seated and visceral rejection of tikanga Māori as a source of law will continue *ad infinitum.*

3 The Dearth of Systemic Change

While New Zealand law has undergone significant substantive change, Dawson exposes the complete stasis regarding *form* and the rules of recognition. He notes that the sources of New Zealand law have remained unchanged since 1900, engendering a

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[364] Dawson, above n 2, at 61.
[365] For judicial affirmation of this commitment, see the obiter comment of Somers J in the *Lands* case, above n 320, at 690: "Sovereignty in New Zealand resides in Parliament." For current statutory expression of this principle, see the Supreme Court Act 2003, s 3(2), which clarifies that "[n]othing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament."
[366] Dawson, above n 2, at 61.
[367] At 61. On the perceived threat of legal pluralism to the state's supreme right to "define, regulate, and enforce the legal system and standards of justice," see Deborah H. Isser "The Problem with Problematizing Legal Pluralism" in Brian Z. Tamanaha, Caroline Sage and Michael Woolcock (ed) *Legal Pluralism and Development* (Cambridge University Press, Cambridge, 2012) 237 at 239.

monocultural system "based almost entirely on New Zealand legislation and English common law, with… virtually no recognition within the state legal order of Māori customary law."[368] Dawson attributes this legal inertia to the sheer intensity of the colonisation process within New Zealand, the potent ideological undercurrents mentioned above, and in particular, their almost total displacement of Māori customary law from the state legal system.[369] Given New Zealand's past and present hostility to Indigenous customary law, he envisages the future as heralding only *limited* re-recognition of tikanga Māori, for example, the "partial indigenisation of specialist courts."[370]

Significantly, all of Dawson's hypothesised means of recognition would occur under the aegis of Parliament. What of the possibility of common law incorporation? While this was not expressly canvassed in his article, Dawson asserts that "more radical changes" would require "a significant change in the dominant legal philosophy and culture," "a different notion of sovereignty," and "an expanded legal imagination and a willingness to take greater risks, on the part of the New Zealand legal profession and state."[371] Dawson doubted that such transformations were imminent. Has his scepticism been eclipsed by *Takamore*? Does the latest verdict of the Supreme Court evince the requisite "significant change" in New Zealand's legal ethos?

This chapter argues that it does not. Although Dawson's article predates *Takamore* by four years, his perceptive comments apropos Māori customary law remain pertinent. This is because *Takamore* actually clinches something akin to the weak statutory incorporation alluded to in Dawson's article. *Takamore* effects a substantive legal change, rather than any momentous or ground-breaking change in the systemic rules of recognition.[372] Much like the weak injection of Māori concerns into strictly delineated legislative schemes, tikanga Māori is given the status of a "mandatory relevant consideration" in the context of burial disputes.[373] However, Māori interests will not automatically trump all others when the final decision is made, but may be

[368] Dawson, above n 2, at 58.
[369] At 58. See Law Commission, above n 11, at chapter 3.
[370] At 62.
[371] At 62.
[372] At 57.
[373] See Roughan, above n 3, at 147-148, for comments on the Resource Management Act 1991 and its "special" purposive and substantive references to tikanga Māori.

surpassed by other, aggregate interests and considerations.[374] This is not a manifestation of deep inter-systemic interaction or "legal association," but merely the selective appropriation of useful Māori concepts by the dominant legal system.[375] Currently, the State "retains some de facto capacity to shift away from respecting pluralism and tikanga whenever it chooses."[376]

As Dawson indicates, these substantive statutory developments are "a considerable national achievement," deliberate race-relations manoeuvres which have "kept the peace."[377] And all without sacrificing the positivist monopoly over the formal sources of law. The legal profession has therefore stigmatised any "strong" sense of legal pluralism,[378] as such schismatic power-sharing would contravene the bedrock values of New Zealand law: positivism and parliamentary sovereignty.

E Colonial Colloquies vs. Indigenous Iterations

Equally, a vociferous group of Māori scholars rejects legal pluralism for reasons of cultural and political autonomy and mana.[379] As a result of settler lawfare, contemporary Māori must articulate claims for legal recognition of their law-ways in a counterintuitive, monocultural way. This uncomfortable ultimatum obliges Māori to either abandon such claims, or adopt the State-endorsed legal norms and "participate inside the common law constitutionalism that had engulfed them."[380] Thus, in an ostensibly post-colonial era, many Māori feel trapped within a colonial common law framework and a white man's legal lexicon. These individuals recognise that, without

[374] Dawson, above n 2, at 57. See Chapter III (above) for a closer dissection of the Supreme Court's ruling in *Takamore.*
[375] Roughan, above n 3, at 146.
[376] At 177.
[377] Dawson, above n 2, at 62.
[378] Although the meaning of legal pluralism is unsettled, one definition that has attained basic academic consensus is "a situation in which two or more legal systems coexist in the same social field": Sally Engle Merry "Legal Pluralism" (1988) 22 Law and Society Rev 869 at 870. Arguably, non-Indigenous scaremongering on the question of sovereignty has played a complementary role in preventing the legal recognition of Indigenous customary law in numerous jurisdictions. See Alan Cairns *Citizens Plus: Aboriginal Peoples and the Canadian State* (UBC Press, Vancouver, 1999) at 100.
[379] While the majority of these writers have focused on the statutory incorporation of Māori custom and law, their arguments are equally applicable to judicial recognition and incorporation. Indeed, Roughan notes that the selective juridification of certain rules of tikanga has enabled the state "to isolate and control the extent to which they are given legal effect by, or incorporated into, the dominant system, *either through statute or via the common law*": Roughan, above n 3, at 145 (emphasis added).
[380] McHugh *Aboriginal Societies,* above n 40, at 4.

deeper systemic change, judicial recognition of tikanga Māori is meaningless and the umbrella of legal pluralism amounts to nothing but window-dressing.

This Indigenous scepticism is by no means unique to New Zealand. The late Perry Shawana epitomised Canadian First Nations' opposition to "Western-based attempts to support Indigenous knowledge by using a protection approach… grounded in pluralist ideology."[381] In a similar vein, Taiaiake Alfred decreed that "Indigenous leaders who engage in arguments framed by a Western liberal paradigm cannot hope to protect the integrity of their nations."[382] Speaking of Aboriginal societies generally, McHugh explains "the enduring paradox" of the ostensibly post-colonial era thus: the more Indigenous peoples rejected the consequences of colonialism, "the more they co-opted (and adapted) key elements of it, such as (most notably) its legalism."[383] According to McHugh, this "enforced co-habitation" with imperial legalism has been "for some, a bitter legacy of colonialism."[384] Both prominent voices in the New Zealand debate, Ani Mikaere[385] and Moana Jackson echo McHugh's thesis and denounce the alleged concessions of legal pluralism as covert neo-colonialism.[386]

Jackson cynically depicts legal pluralism as "inherently assimilative and racist," a deceptive and powerful ideological weapon within the positivist's arsenal.[387] Under "a guise of sensitivity and good faith," he argues, "the colonial certainty of overt dismissal [of Māori customary law] has been replaced by a new-age legalism."[388] Far from honouring the law-ways of tikanga, this effete pluralism allows the "Pakeha

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[381] Perry Shawana "Legal Processes, Pluralism in Canadian Jurisprudence, and the Governance of Carrier Medicine Knowledge" in Law Commission of Canada (ed) *Indigenous Legal Traditions* (UBC Press, Vancouver, 2007) 114 at 123.
[382] Taiaiake Alfred *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford University Press, Oxford, 1999) at 40.
[383] McHugh *Aboriginal Societies,* above n 40, at 56.
[384] At 56.
[385] For arguments on the legal supremacy and first-law status of tikanga Māori, see Ani Mikaere "How Will the Future Generations Judge Us? Some Thoughts on the Relationship Between Crown Law and Tikanga Māori" (paper presented to the Ma te Rango te Waka ka Rere: Exploring a Kaupapa Maori Organisational Framework, Te Wananga o Raukawa, Otaki, 2006); "Cultural Invasion Continued: The Ongoing Colonisation of Tikanga Māori" (2005) Yearbook of New Zealand Jurisprudence 134; "Tikanga as the First Law of Aotearoa," above n 41.
[386] Moana Jackson "Changing Realities: Unchanging Truths" in Commission on Folk Law and Legal Pluralism (ed) *Papers Presented to the Congress at Victoria University of Wellington, August 1992: Volume II* (Law Faculty, Victoria University of Wellington, Wellington, 1992) 443 at 454. See also Jackson 'The Treaty and the Word: The Colonization of Maori Philosophy' in Graham Oddie & Roy Perret (ed) *Justice, Ethics and New Zealand Society* (Auckland: Oxford University Press, 1992) at 1.
[387] Jackson "Changing Realities: Unchanging Truths," above n 386, at 444.
[388] At 446.

legal system" to consolidate its hegemony by co-opting Māori legal concepts and processes, thereby remaining "a colonising leviathan that can choose which norms of the oppressed will be validated and which will be dismissed.[389] On such arguments, corraling tikanga Māori within the jurisdiction of the general courts would simply empower a predominantly Pakeha institution to unilaterally "define and reshape Māori customary law"[390] and lead to its stagnation.[391] These assertions intimate that the contemporary courts are doing nothing fundamentally different from their colonial counterparts, as the legal system has not changed radically enough to enable them to do so.

[389] At 452-453. For a striking indictment of the self-professedly "enlightened" pluralism as engendering "merely further blows in that dreadful attack to which colonisation subjects the indigenous soul," see Jackson "Justice and Political Power," above n 41, at 254.
[390] Seuffert *Jurisprudence of National Identity*, above n 51, at 33.
[391] Nin Tomas "Indigenous Peoples and the Māori: The Right to Self-Determination in International Law - From Woe to Go" [2008] NZ L Rev 639 at 667-668.

Conclusion: Inter-systemic Impasse

Whatever happened to New Zealand's impressive "*fin de siècle* jurisprudence of engagement" with Aboriginal claims?[392] Following the *Lands* case in 1987, it became *de rigueur* to "elevate the legal and political status of the Treaty from the nadir to which, it is said, it had been consigned by *Parata,*" through both legislation and case law.[393] The Treaty has been flaunted as "the founding document of New Zealand,"[394] "a grand constitutional compact,"[395] "essential to the foundation of New Zealand,"[396] and "of the greatest constitutional importance to New Zealand."[397] But how far does this reverential swooning extend? Is it precise, prophetic, or simple puffery? What does all this "lofty rhetoric"[398] mean for the common law recognition of tikanga Māori?

As this dissertation has argued, it means very little. In the realm of customary law at least, the 'breakthrough era' has ground to a halt. The status quo has been neatly summarised by McHugh, who states that even where Māori customary law has been granted legal status, it remains submerged beneath "various statutory schemes and discretions."[399] Currently, New Zealand's legal system:[400]

> … gives hegemony to the law-ways of one Treaty partner, the Pakeha. It is certainly within the spirit of the Treaty, if not directly required by *te tino rangatiratanga*, that the law-ways of the other Treaty partner be put on something like an equal footing.

The continued denial of "equal footing" in law reifies the status of the Treaty as "a simple nullity," and implicitly categorises Māori as "primitive barbarians" devoid of "any body of law or custom capable of being understood and administered by the

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[392] McHugh *Aboriginal Societies*, above n 40, at 10.
[393] Williams, above n 134, at 3 declares that this elevation was achieved by incorporating "the principles of the Treaty of Waitangi" into various statutes, and then in the watershed *Lands* case.
[394] Te Puni Kokiri *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as Expressed by the Court and the Waitangi Tribunal* (2001) at 14.
[395] Geoffrey Palmer *Constitutional Conversations* (Victoria University Press, Wellington, 2002) at 22.
[396] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210 per Chilwell J.
[397] *New Zealand Māori Council v Attorney-General,* above n 338, at 516 per Lord Wolff.
[398] Williams, above n 134, at 3.
[399] McHugh *Māori Magna Carta,* above n 38, at 95-96.
[400] At 95.

Courts of a civilised country."[401] By refusing to recognise the inherent legality of Indigenous legal traditions, our common law has ensured the reverberation of the above, oft-vilified dicta of Prendergast CJ. This inertia is due to the ideology (and longevity) of English law, which continues to influence both the content and sources of New Zealand law. While modern New Zealand courts proclaim their willingness to consider tikanga Māori, theirs is a profession imbued with the same legal norms and rules as their 19th-century forebears. Consequently, despite all protestations to the contrary, their decisions are remarkably similar.

[401] *Wi Parata*, above n 1, at 77-78.

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